CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

Automated Commercial Environment (ACE): Ability of Truck Carriers to Use Third Parties to Submit Manifest Information in the Test of the ACE Truck Manifest System

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that the Bureau of Customs and Border Protection (CBP) will permit truck carriers who are not Automated Commercial Environment (ACE) Truck Carrier Accounts to use third parties to transmit truck manifest information on their behalf electronically in the ACE Truck Manifest system, via electronic data interchange (EDI) messaging. Truck carriers electing to use a third party to submit manifest information to CBP must possess a valid Standard Carrier Alpha Code (SCAC) from the National Motor Freight Traffic Association. Truck carriers who elect to use this transmission method will not have access to operational data and will not receive status messages on ACE transactions, nor will they have access to integrated Account data from multiple system sources. These truck carriers will be able to obtain release of their cargo, crew, conveyances, and equipment via EDI messaging back to the transmitter of the information. By making these changes, CBP is opening the test to parties previously ineligible to participate.

EFFECTIVE DATE: Truck carriers will be able to participate in ACE through the use of a third party transmitter starting on March 29, 2006.

FOR FURTHER INFORMATION CONTACT: Mr. James Swanson, via email at james.d.swanson@dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 4, 2004 and September 13, 2004, CBP published General Notices in the **Federal Register** (69 FR 55167 and 69 FR

5360) announcing a test, in conjunction with the Federal Motor Carrier Safety Administration (FMCSA), allowing participating truck carriers to transmit electronic manifest data in ACE, including advance cargo information as required by section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002 (see 68 FR 68140). The advance cargo information requirements are detailed in the final rule published in the **Federal Register** at 68 FR 68140 on December 5, 2003. Truck carriers participating in the test opened up Truck Carrier Accounts which provided them with the ability to electronically transmit truck manifest data and obtain release of their cargo, crew, conveyances, and equipment via the ACE Portal or electronic data interchange (EDI) messaging.

In the September 13, 2004 notice, CBP stated that, in order to be eligible for participation in this test, a carrier must have:

1. Submitted an application (i.e., statement of intent to establish an ACE Account and to participate in the testing of electronic truck manifest functionality) as set forth in the February 4, 2004, **Federal Register** notice (69 FR 5360);
2. Provided a Standard Carrier Alpha Code(s) (SCAC);
3. Provided the name, address, and e-mail of a point of contact to receive further information.

In addition, participants intending to use the ACE Secure Data Portal as the means to file the manifest must submit a statement certifying the ability to connect to the Internet. Participants intending to use an EDI interface are required to first test their ability to send and receive electronic messages in either American National Standards Institute (ANSI) X12 or United Nations / Directories for Electronic Data Interchange for Administration, Commerce and Transport (UN/EDIFACT) format with CBP. The September 13, 2004 notice indicated that acceptance into this test does not guarantee eligibility for, or acceptance into, future technical tests.

IMPLEMENTATION

Through this notice, CBP announces a change whereby truck carriers no longer have to open ACE Truck Carrier Accounts to participate in the ACE test. Specifically, truck carriers may elect to use a third party to submit electronic manifest information via EDI to CBP. Truck carriers participating in this fashion will not have access to operational data and will not receive status messages on ACE Accounts, nor will they have access to integrated Account data from multiple system sources. These truck carriers will be able to obtain release of their cargo, crew, conveyances, and equipment via EDI messaging back to the transmitter of the information.

If the third party transmitting the truck manifest information to CBP does not use EDI, but instead wishes to use the ACE portal, the truck carrier who is submitting that information to the third party

(for transmission to CBP) must have an ACE Truck Carrier Account as described in the February 4, 2004, General Notice (69 FR 5360).

A truck carrier using a third party to transmit via EDI cargo, crew, conveyance and equipment information to CBP must have a Standard Carrier Alpha Code (SCAC). Any truck carrier with a SCAC may arrange to have a third party transmit manifest information to CBP via EDI consistent with the requirements of the ACE Truck Manifest Test.

Previous Notices Continue To Be Applicable

All of the other aspects of the ACE Truck Manifest Test as set forth in the September 13, 2004, notice (69 FR 55167), as modified by the General Notice published in the **Federal Register** (70 FR 13514) on March 21, 2005, continue to be applicable. (The March 21, 2005 notice clarified that all relevant data elements are required to be submitted in the automated truck manifest submission.) All of the aspects of the February 4, 2004, notice (69 FR 5360) also continue to be applicable, except as revised in this notice.

DATED: March 22, 2006

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, March 29, 2005 (71 FR 15756)]

AGENCY INFORMATION COLLECTION ACTIVITIES: CUSTOMS MODERNIZATION ACT RECORDKEEPING REQUIREMENTS

AGENCY: Bureau of Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: CBP has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: Customs Modernization Recordkeeping Requirements. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (70 FR 58453) on October 6, 2005, allowing for a 60-day comment period. This notice allows for an additional 30 days

for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before April 27, 2006.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–7285.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: Customs Modernization Act Recordkeeping Requirements

OMB Number: 1651–0076

Form Number: N/A

Abstract: This information and records keeping requirement is required to allow CBP to verify the accuracy of the claims made on the entry documents regarding the tariff status of imported merchandise, admissibility, classification/nomenclature, value and rate of duty applicable to the entered goods.

Current Actions: This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses, Individuals, Institutions

Estimated Number of Respondents: 4,695

Estimated Time Per Respondent: 1,037 hours
Estimated Total Annual Burden Hours: 4,870,610
Estimated Total Annualized Cost on the Public: N/A
If additional information is required contact: Tracey Denning, Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–344–1429.

Dated: March 21, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, March 28, 2006 (72 FR 15468)]

Tuna — Tariff-Rate Quota

The tariff-rate quota for Calendar Year 2006, on tuna classifiable under subheading 1604.14.22, Harmonized Tariff Schedule of the United States (HTSUS).

AGENCY: .S. Customs and Border Protection, Department of Homeland Security

ACTION: Announcement of the quota quantity of tuna in airtight containers for Calendar Year 2006.

SUMMARY: Each year the tariff-rate quota for tuna described in subheading 1604.14.22, HTSUS, is based on the apparent United States consumption of tuna in airtight containers during the preceding Calendar Year. This document sets forth the tariff-rate quota for Calendar Year 2006.

EFFECTIVE DATES: The 2006 tariff-rate quota is applicable to tuna entered or withdrawn from warehouse for consumption during the period January 1, through December 31, 2006.

FOR FURTHER INFORMATION CONTACT:

Headquarters Quota Branch, Textile Enforcement and Operations Division, Trade Compliance and Facilitation, Office of Field Operations, U.S. Customs and Border Protection, Washington, DC 20229, (202) 344–2650.

BACKGROUND:

It has been determined that 19,484,313 kilograms of tuna in airtight containers may be entered and withdrawn from warehouse for consumption during the Calendar Year 2006, at the rate of 6 percent ad valorem under subheading 1604.14.22, HTSUS. Any such tuna

which is entered or withdrawn from warehouse for consumption during the current calendar year in excess of this quota will be dutiable at the rate of 12.5 percent ad valorem under subheading 1604.14.30 HTSUS.

Dated: March 20, 2006

WILLIAM S. HEFFELFINGER III,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, March 24, 2006 (71 FR 14934)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, March 29, 2006

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF TWO RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A RADIOTELEPHONY BASE STATION CABINET AND A NOISE-LIMITING HOOD.

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of a radiotelephony base station cabinet and noise limiting hood.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the tariff classification of a radiotelephony base station cabinet and revoking one ruling letter relating to the tariff classification of a noise-limiting hood under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). CBP is also revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed action was published on February 1, 2006, in Volume 40, Number 6, of the CUSTOMS BULLETIN. CBP received no comments in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2006.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Tariff Classification and Marking Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke two ruling letters pertaining to the tariff classification of a radiotelephony base station cabinet and a noise-limiting hood was published in the February 1, 2006, CUSTOMS BULLETIN, Volume 40, Number 6. No comments were received.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in the notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY R00933, CBP ruled that the radiotelephony base station cabinet was classified in subheading 9403.10.0040, HTSUSA, which

provides for "Other furniture and parts thereof: Metal furniture of a kind used in offices, Other." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that the radiotelephony base station cabinet should be classified in subheading 8529.90.8600, HTSUS, which provides for "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other."

In NY R02586, CBP ruled that the noise-limiting hood was classified in subheading 9403.90.8040, HTSUSA, which provides for "Other furniture and parts thereof: Parts: Other: Other, Of metal." Since the issuance of that ruling, CBP has reviewed the classification of this item and has determined that the cited ruling is in error, and that the noise-limiting hood should be classified in subheading 8529.90.8600, HTSUS, which provides for "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY R00933, NY R02586 and any other ruling not specifically identified, to reflect the proper classification of the radiotelephony base station cabinet according to the analysis contained in Headquarters Ruling Letter (HQ) 967961, set forth as Attachment A to this document and the proper classification of the noise-limiting good according to the analysis contained in Headquarters Ruling Letter (HQ) 967960, set forth as Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: March 21, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967961
March 21, 2006
CLA–2 RR:CTF:TCM 967961 KSH
TARIFF NO.: 8529.90.8600

MS. MELISSA HOFFMAN
ERICSSON, INC.
6300 Legacy Drive
Plano, TX 75024

RE: Revocation of New York Ruling Letter (NY) R00933, dated October 18, 2004; Classification of a radiotelephony base station cabinet.

DEAR MS. HOFFMAN:

This is in response to your letter of October 3, 2005, in which you request reconsideration of New York Ruling Letter (NY) R00933, issued on October 18, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a radiotelephony base station cabinet. The radiotelephony base station cabinet was classified in subheading 9403.10.0040, HTSUSA, which provides for: "Other furniture and parts thereof: Metal furniture of a kind used in offices, Other." You assert that the radio-telephony base station cabinet is classified in subheading 8529.90.8600, HTSUSA, which provides for: "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other." At your request, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed modification of NY R00933 was published in the February 1, 2006, CUSTOMS BULLETIN, Volume 40, Number 6. No comments were received in response to the notice.

FACTS:

The unequipped metal cabinets, part numbers BFM 901 042/3 and BFM 901 042/4 contain an empty rack and are made up of doors, mounting sets, earthing set, nuts, screws and angle bars. The cabinets are designed for placement outdoors and are designed to meet demands for disturbance immunity, heat dissipation, flexibility of layout and maintainability. The cabinets are used to house all of the necessary radiotelephonic equipment necessary for cellular phones to operate. The cabinet will be located outdoors on the roofs of buildings to provide the necessary signal generation, amplification and networking necessary for radiotelephonic communications.

ISSUE:

Whether the radiotelephonic base station cabinet is classified in heading 9403, HTSUSA, or in heading 8529, HTSUSA.

LAW AND ANALYSIS:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be de-

termined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. It is Customs and Border Protections' (CBP) practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUSA. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Note 1(g) to Chapter 94, HTSUS states in pertinent part:

This chapter does not cover: . . .

(g) Furniture specially designed as part of apparatus . . . of headings 8525 to 8528 (heading 8529).

Therefore, it must be determined if the article in question is a piece of furniture specially designed for apparatus of heading 8525 to 8528, HTSUS.

Heading 8525, HTSUS, covers:

Transmission apparatus for radiotelephony, radiotelegraphy, radiobroadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras or other video camera recorders; digital cameras.

Heading 8529, HTSUS, provides for "[p]arts suitable for use solely or principally with the apparatus of headings 85.25 to 85.28."

The E.N. to heading 8529, HTSUS, provides in relevant part:

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), this heading covers parts of the apparatus of the four preceding headings. The range of parts classified here includes :

(3) Cases and cabinets specialised to receive the apparatus of headings 85.25 to 85.28.

Based upon the internal design schematics of the cabinet and exterior design of the cabinet which allow it to be located outdoors on the roofs of buildings to provide the necessary signal generation, amplification and networking necessary for radiotelephonic communications, the radiotelephony base station cabinet is clearly intended to house cellular telephone equipment. Radiotelephony equipment is classified in heading 8525, HTSUS. See HQ 962909, dated May 20, 2000. As such it is principally used with the apparatus of heading 8525, HTSUS. Note 1(g) to Chapter 94, HTSUS, excludes furniture specially designed as part of apparatus . . . of headings 8525 to 8528 (heading 8529). Accordingly, pursuant to GRI 1, the radiotelephony base station cabinet is classified in heading 8529, HTSUS. It is specifically provided for in subheading 8529.90.8600, HTSUS.

HOLDING:

The radiotelephony switching base cabinet is classified in heading 8529, HTSUS. It is specifically provided for in subheading 8529.90.8600, HTSUS, which provides for "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other." The column one, general rate of duty is free.

EFFECT ON OTHER RULINGS:

NY R00933, dated October 18, 2004, is hereby revoked.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967960
March 21, 2006
CLA–2 RR:CTF:TCM 967960 KSH
TARIFF NO.: 8529.90.8600

MS. MELISSA HOFFMAN
ERICSSON, INC.
6300 Legacy Drive
Plano, TX 75024

RE: Revocation of New York Ruling Letter (NY) R02586, dated September 27, 2005; Classification of a noise-limiting hood.

DEAR MS. HOFFMAN:

This is in response to your letter of October 3, 2005, in which you request reconsideration of New York Ruling Letter (NY) R02586, issued on September 27, 2005, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUS) of a noise-limiting hood. The noise limiting hood was classified in subheading 9403.90.8040, HTSUS, which provides for "Other furniture and parts thereof: Parts: Other: Other, Of metal." You assert that the noise-limiting hood is classified in heading 8529.90.8600, HTSUS, which provides for "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other." At your request, CBP has reviewed the classification of this item and has determined that the cited ruling is in error.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice of the proposed modification of NY R02586 was published in the February 1, 2006, CUSTOMS BULLETIN, Volume 40, Number 6. No comments were received in response to the notice.

FACTS:

The noise-limiting hood is constructed from aluminum that is coated with a sound absorbent polyurethane plastic. It also includes small stainless steel brackets that are used for installation. The hood functions to reduce the noise level of the operating radio base station by approximately 10 decibels. It is designed exclusively for use within a radiotelephonic base station. A radiotelephonic base station contains all necessary transmission and or reception devices necessary for the proper operation of cellular telephone service.

ISSUE:

Whether the noise-limiting hood is classified in heading 9403, HTSUS, or in heading 8529, HTSUS.

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is Customs and Border Protections' (CBP) practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Note 1(g) to Chapter 94, HTSUS, states in pertinent part:

> This chapter does not cover: . . .
>
> (g) Furniture specially designed as part of apparatus . . . of headings 8525 to 8528 (heading 8529).

Therefore, it must be determined if the article in question is a piece of furniture specially designed for apparatus of heading 8525 to 8528, HTSUS.

Heading 8525, HTSUS, covers:

> Transmission apparatus for radiotelephony, radiotelegraphy, radiobroadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television cameras; still image video cameras or other video camera recorders; digital cameras.

Heading 8529, HTSUS, provides for "[p]arts suitable for use solely or principally with the apparatus of headings 85.25 to 85.28."

The noise-limiting hood is used exclusively with radiotelephonic equipment. Radiotelephony equipment is classified in heading 8525, HTSUS. See HQ 962909, dated May 20, 2000. Radio base station cabinets are classified under heading 8529, HTSUS. See the E.N. to heading 8529, HTSUS, which reads in relevant part:

Subject to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), this heading covers parts of the apparatus of the four preceding headings. The range of parts classified here includes :

(3) Cases and cabinets specialised to receive the apparatus of headings 85.25 to 85.28.

In accordance with Note 1(g) to Chapter 94, HTSUS, the noise-limiting hood is not a part of furniture since it is used within a radio base station cabinet. Pursuant to GRI 1, the noise-limiting hood is classified in heading 8529, HTSUS. It is specifically provided for in subheading 8529.90.8600, HTSUS.

HOLDING:

The noise-limiting hood is classified in heading 8529, HTSUS. It is specifically provided for in subheading 8529.90.8600, HTSUS, which provides for "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528: Other parts of articles of headings 8525 and 8527, except parts of cellular telephones: Other." The column one, general rate of duty is free.

EFFECT ON OTHER RULINGS:

NY R02586, dated September 27, 2005, is hereby revoked.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

19 CFR PART 177

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF ANODES AND CATHODES USED IN ELECTROLYSIS

AGENCY: U. S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of anodes and cathodes used in electrolysis.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CBP is revoking a ruling relating to the tariff classification of anodes and cathodes used in electrolysis under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment CBP has previously accorded to substantially identical transactions. Notice of the proposed revocation was pub-

lished on February 8, 2006, in the Customs Bulletin. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after June 12, 2006.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification and Marking Branch (202) 572–8779.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to CBP's obligations, a notice was published on February 8, 2006, in the Customs Bulletin, Volume 40, Number 7, proposing to revoke NY R02374, dated August 29, 2005, which classified ruthenium-coated titanium anodes and platinum-coated nickel cathodes - collectively referred to as electroplating anodes - as articles of precious metal or of metal clad with precious metal, in subheading 7115.90.60000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised CBP during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.

1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment it previously accorded to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY R02374 to reflect the proper classification of the anodes and cathodes, as described, in subheading 8543.90.8880, HTSUSA, as other parts of electrical machines and apparatus, having individual functions, not specified or included elsewhere in chapter 85, in accordance with the analysis in HQ 967941, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling/these rulings will become effective 60 days after publication in the Customs Bulletin.

DATED: March 28, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 967941
March 28, 2006
CLA–2 RR:CTF:TCM 967941 JAS
CATEGORY: Classification
TARIFF NO.: 8543.90.8880

MR. WILLIAM PAULIN
KUEHNE CHEMICAL COMPANY, INC.
86 North Hackensack Avenue
South Kearny, NJ 07032

RE: Anodes and Cathodes Used In Machines for Electrolysis; NY R02374 Revoked

DEAR MR. PAULIN:

In NY R02374, which the National Commodity Specialist Division, U.S. Customs and Border Protection, New York, issued to you on August 29, 2005, certain anodes and cathodes used in electrolysis were found to be classifiable as other articles of precious metal or of metal clad with precious

metal, in 7115.90.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY R02374 was published on February 8, 2006, in the Customs Bulletin, Volume 40, Number 7. No comments were received in response to this notice.

FACTS:

In NY R02374, ruthenium-coated titanium anodes and platinum-coated nickel cathodes for use in an electrolysis plant were held to be classifiable as other articles of precious metal or of metal clad with precious metal, in subheading 7115.90.6000, HTSUSA. The ruling described articles that were to be used in the electrodeposition of the precious metal component onto other metal objects with the base metals, titanium and nickel, being used as carrier media for the precious metal. After the precious metal is diminished, the anodes and cathodes are returned to the United Kingdom to be refurbished.

You have explained that the anodes and cathodes are in fact used in an electrolysis plant to electrolyze brine into chlorine and sodium hydroxide. The precious metal coatings, platinum and ruthenium, act as a catalyst to allow the proper chemical reactions to occur. The precious metals are not redeposited onto other metal objects.

The HTSUS provisions under consideration are as follows:

7115	Other articles of precious metal or of metal clad with precious metal:
7115.90	Other:
	Other:
7115.90.60	Other
*	* * *
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in [Chapter 85]; parts thereof:
8543.30.00	Machines and apparatus for electroplating, electrolysis or electrophoresis
8543.90	Parts:
	Other:
	Other:
8543.90.88	Other

ISSUE:

Whether the anodes and cathodes, as described, are provided for in heading 8543.

LAW AND ANALYSIS:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Initially, Chapter 71, Note 3(k), HTSUS, states that machinery, mechanical appliances or electrical goods, or parts thereof, of section XVI, are not covered by chapter 71. Therefore, the issue is whether the anodes and cathodes, as described, are parts for tariff purposes and, if so, whether they are parts of electrical goods of chapter 84 or chapter 85.

As to the parts issue, articles that are integral, constituent components of another article, are necessary to the completion of that article, and which satisfy a specific and integral need in the operation of that article qualify as parts for tariff purposes. See Mitsubishi Int'l v. United States, 17 CIT 871, 829 F. Supp. 1387 (1993), and cases cited. The ruthenium-coated titanium anodes and platinum-coated nickel cathodes allow the proper chemical reactions to occur in the electrolytic process by which chlorine and sodium hydroxide are produced. These articles satisfy the above criteria for parts of machines and apparatus for electrolysis.

Subject to certain exceptions that are not relevant here, goods that are identifiable as parts of machines or apparatus of Chapter 84 or Chapter 85 are classifiable in accordance with Section XVI, Note 2, HTSUS. *See* Nidec Corporation v. United States, 861 F. Supp. 136, aff'd. 68 F. 3d 1333 (1995). Parts which are goods included in any of the headings of Chapters 84 and 85 are in all cases to be classified in their respective headings. *See* Note 2(a). Other parts, if suitable for use solely or principally with a particular machine, or with a number of machines of the same heading, are to be classified with the machines of that kind. *See* Note 2(b). Machines and apparatus for electrolysis are specifically provided for in subheading 8543.30.00, HTSUS. By function and design, the described anodes and cathodes appear to be principally, if not solely, used with such machines and apparatus.

HOLDING:

Under the authority of GRI 1 and Section XVI, Note 2(b), the ruthenium-coated titanium anodes and platinum-coated nickel cathodes are provided for in heading 8543. They are classifiable in subheading 8543.90.88.80, HTSUSA.

EFFECT ON OTHER RULINGS:

NY R02374, dated August 29, 2005, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF A CERTAIN BASE METAL MEDALLION

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter and revocation of treatment relating to the classification of a certain base metal medallion.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a certain base metal medallion. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before May 13, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark, Trade and Commercial Regulations Branch, at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572–8828.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade

community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter relating to the tariff classification of a certain base metal medallion. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) 894287, dated January 31, 1994, (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY 894287, CBP classified a certain base metal medallion in subheading 7806.00.0000, ("HTSUS"), which provides for "Other articles of lead: Other." We have determined that the classification set forth for the medallion in NY 894287 is incorrect. The medallion is worn as personal adornment and does not incorporate precious metal or metal clad with precious metal, natural or cultured pearls, or precious or semi-precious stones. It is now CBP's position that the medallion is properly classified in subheading 7117.19.0000, HTSUS, which provides for "Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to revoke NY 894287 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 968149 (Attachment B). Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: March 28, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY 894287 January 31, 1994
CLA–2–78:S:N:N3:115 894287
CATEGORY: Classification
TARIFF NO.: 7806.00.0000

MR. SHELDON BERNSTEIN
THE IRWIN BROWN COMPANY
212 Chartres St., P.O. Box 2426
New Orleans, LA 70176–2426

RE: The tariff classification of award medallions from Taiwan.

DEAR MR. BERNSTEIN:

In your letter dated January 25, 1994, you requested a tariff classification ruling, on behalf of your client, The Trophy House in Baton Rouge, LA. The subject item is an award medallion approximately 2" in diameter with the designation Scholar ARCS Foundation, Inc. on its surface. It is mainly made of lead. This item will be given to award recipients and worn only at ceremonies.

The classification of merchandise under the HTS is governed by the General Rules of Interpretation (GRI'S). GRI 1, HTS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. . .". This Rule applies to your product.

The applicable subheading for the award medallion will be 7806.00.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of lead: other. The duty rate will be 3.9% ad valorem.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968149
CLA–2 RR:CTF:TCM 968149 HkP
CATEGORY: Classification
TARIFF NO.: 7117.19.9000

MR. SHELDON BERNSTEIN
THE IRWIN BROWN COMPANY
212 Chartres Street
P.O. Box 2426
New Orleans, LA 70176–2426

RE: Award medallion from Taiwan; revocation of NY 894287

DEAR MR. BERNSTEIN:

This is in reference to New York Ruling Letter (NY) 894287, issued to you on January 31, 1994, in which the tariff classification of award medallions was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). NY 894287 classified the medallion in heading 7806, HTSUS, as "other articles of lead". We have reconsidered NY 894287 and have determined that the tariff classification of the medallion is not correct.

FACTS:

NY 984287 described the medallion as follows:

> The subject item is an award medallion approximately 2″ in diameter with the designation Scholar ARCS Foundation, Inc. on its surface. It is made mainly of lead. This item will be given to award recipients and worn only at ceremonies.

ISSUE:

Whether the subject medallion is classified in heading 7806, HTSUS, which provides for: "other articles of lead", or in heading 7117, HTSUS, which provides for: "imitation jewelry."

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the

goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7117	Imitation jewelry:
	Of base metal, whether or not plated with precious metal:
7117.19	Other:
	Other:
7117.19.9000	Other. . . . .
7806.00.0000	Other articles of lead. . . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

We first consider heading 7117, HTSUS, which provides for "imitation jewelry". Legal Note 11 to Chapter 71, HTSUS, provides that:

> For the purposes of heading 71.17, the expression "imitation jewellery" means articles of jewellery within the meaning of paragraph (a) of Note 9 . . . not incorporating natural or cultured pearls, precious or semi-precious stones . . . nor (except as plating or as minor constituents) precious metal or metal clad with precious metal.

In turn, Note 9(a) to Chapter 71, HTSUS, provides that "articles of jewellery" means "any small objects of personal adornment . . . (for example, rings, bracelets, necklaces, brooches, . . . , religious or other medals and insignia)". Finally, EN 71.17 explains that the expression "imitation jewelry", as defined in Note 11 to Chapter 71, is restricted to small objects of personal adornment. Consequently, we find that the medallion meets the terms of heading 7117, HTSUS, and the conditions of Legal Note 11 to Chapter 71 because it is an article of personal adornment that does not incorporate precious metal or metal clad with precious metal, natural or cultured pearls, or precious or semi-precious stones.

Conversely, heading 7806.00.0000, HTSUS, which is located in Section XV of the HTSUS, provides for "other articles of lead." Legal Note 1(e) to Section XV, HTSUS, excludes goods of Chapter 71, HTSUS, from Section XV. Further, EN 78.06 explains that heading 7806, HTSUS, "covers all lead articles not included in the preceding headings of this Chapter, or in Chapter 82 or 83, or more specifically covered elsewhere in the Nomenclature."

Applying Legal Note 1(e) to Section XV, HTSUS, and EN 78.06 to these facts, we find that the award medallion is precluded from classification under heading 7806, HTSUS, as the medallion is specifically described in heading 7117, HTSUS, as imitation jewelry.

HOLDING:

By application of GRI 1, we find that the subject medallion is classified in heading 7117, HTSUS, and is specifically provided for in subheading

7117.19.9000, HTSUS, which provides for: "Imitation jewelry: Of base metal, whether or not plated with precious metal: Other: Other: Other."

The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY 894287 is revoked.

MYLES B. HARMON,
Director,
Commercial & Trade Facilitation Division.

PROPOSED REVOCATION OF ONE RULING LETTER, MODIFICATION OF THREE RULING LETTERS, AND REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF CERTAIN STAINLESS STEEL MEASURING SPOONS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of one ruling letter, modification of three ruling letters, and revocation of treatment relating to the classification of certain stainless steel measuring spoons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter and modify three ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain stainless steel measuring spoons. Similarly, CBP proposes to modify any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before May 13, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark, Trade and Commercial Regulations Branch, at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572–8828.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter and modify three ruling letters relating to the tariff classification of certain stainless steel measuring spoons. Although in this notice CBP is specifically referring to the modification of New York Ruling Letter (NY) J87441, dated August 6, 2003 (Attachment A), NY J87521, dated August 6, 2003 (Attachment B), NY E82964, dated June 11, 1999 (Attachment C), and the revocation of NY B86306, dated June 18, 1997 (Attachment D), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the rulings identified above. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to modify any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substan-

tially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY J87441, NY J87521, NY E82964, and NY B86306, CBP classified stainless steel measuring spoons in subheading 8215.99.3000, ("HTSUS"), which provides for "Spoons, forks, ladles, skimmers, cake servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: Other: Other: Spoons and ladles: With stainless steel handles: spoons valued under 25¢ each." Based on our recent review of NY J87441, NY J87521, NY E82964, and NY B86306, we have determined that the tariff classification set forth for the stainless steel measuring spoons, is incorrect. Based on our review, we now believe that the proper tariff classification is subheading 7323.99.9030, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of iron or steel; . . . : Other: Other: Not coated or plated with precious metal: Other: Other: Kitchen or tableware suitable for food or drink contact."

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to modify NY J87441, NY J87521, and NY E82964, and revoke NY B86306, and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper tariff classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letters (HQ) 968080 (Attachment E), HQ 968081 (Attachment F), and HQ 968163 (Attachment G). Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP intends to modify any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: March 28, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY J87441
August 6, 2003
CLA–2–17:RR:NC:SP:232 J87441
CATEGORY: Classification
TARIFF NO.: 0906.10.0000; 1701.91.5400;
1701.91.5800; 1805.00.0000; 8205.51.3030; 8215.99.3000

MR. SHACHAR GAT
SHONFELD'S USA
16871 Noyes Avenue
Irvine, CA. 92606

RE: The tariff classification of Product CCO–205424 from China

DEAR MR. GAT:

In your letter dated July 14, 2003, you requested a tariff classification ruling.

You submitted descriptive literature, product photographs and specifications, and a sample with your request. The merchandise in question is Product CCO–205424 marketed as "coffee flavoring". As the package submitted appears to be a prototype, the weight, and even the actual contents, of the individual items when imported may not be exactly as shown in the sample.

Product CCO–205424 consists of three small (6 inches tall, 2 inches wide) bottles with curved sides that complement each other when fit together. All have twine tied around the bottle neck. These are packaged together to make one retail item. One bottle is said to hold cocoa powder, and has a small metal whisk suspended from the twine. It is assumed for the purposes of this ruling that the cocoa powder is, as the name implies, 100 percent cocoa powder. The second bottle contains cinnamon sticks, and has a small metal grater dangling from its neck. The third bottle is said to contain vanilla sugar, consisting of sugar and added vanilla for flavor. This bottle has a metal measuring spoon (1 teaspoon) attached to the neck. A phone call on August 4, 2003 ascertained that the spoon is stainless steel and is valued at 15 cents.

The combination of items in Product CCO–205424 is not classifiable as a set and therefore each item is classified individually. The applicable subheading for the cinnamon sticks will be 0906.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cinnamon and cinnamon-tree flowers: Neither crushed nor ground. The rate of duty will be Free.

It is assumed, for the purposes of this ruling, that the flavored sugar is derived from sugar cane or sugar beet. The applicable subheading for the vanilla sugar, if described in additional U.S. note 3 to chapter 17 and entered pursuant to its provisions, will be 1701.91.5400, Harmonized Tariff Schedule of the United States (HTS), which provides for Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter: Containing added flavoring matter whether or not containing added coloring: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in addi-

tional U.S. note 8 to this chapter and entered pursuant to its provisions. The rate of duty will be 6 percent ad valorem. If not described in additional U.S. note 3 to chapter 17 and not entered pursuant to its provisions, the applicable subheading will be 1701.91.5800, HTS. The duty rate will be 33.9 cents per kilogram plus 5.1 percent ad valorem. In addition, products classified under subheading 1701.91.5800, HTS, will be subject to additional duties based on their value as described in subheadings 9904.17.49 to 9904.17.56, HTS.

The applicable subheading for the cocoa powder will be 1805.00.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cocoa powder, not containing added sugar or other sweetening matter. The rate of duty will be 0.52 cents per kilogram.

The applicable subheading for the grater and the metal whisk, if of iron or steel, will be 8205.51.3030, Harmonized Tariff Schedule of the United States (HTS), which provides for Handtools (including glass cutters) not elsewhere specified or included . . . : Other handtools (including glass cutters) and parts thereof: Household tools, and parts thereof: Of iron or steel: Other (including parts) . . . Kitchen and table implements. The rate of duty will be 3.7 percent ad valorem.

The applicable subheading for the stainless steel measuring spoon will be 8215.99.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware and base metal parts thereof: Other: Other . . . Spoons and ladles: With stainless steel handles: Spoons valued under 25 cents each. The rate of duty will be 14 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Maria at (646) 733–3031.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY J87521
August 6, 2003
CLA–2–17:RR:NC:SP:232 J87521
CATEGORY: Classification
TARIFF NO.: 0906.10.0000; 1701.91.5400; 1701.91.5800; 1805.00.0000; 8205.51.3030; 8215.99.3000

MR. SHACHAR GAT
SHONFELD'S USA
16871 Noyes Avenue
Irvine, CA. 92606

RE: The tariff classification of Product SA–204129 from China

DEAR MR. GAT:

In your letter dated July 15, 2003, you requested a tariff classification ruling.

You submitted descriptive literature, product photographs and specifications, and a sample with your request. The merchandise in question is Product SA–204129 marketed as "coffee toppings". As the package submitted appears to be a prototype, the weight, and even the actual contents, of the individual items when imported may not be exactly as shown in the sample.

Product SA–204129 consists of three "Acropolis" bottles. These are 9 1/2 inch tall, four sided bottles that taper from a width of 2 inches at the top to 1 inch at the bottom, and that stand on a 2 inch square flanged glass base. All have twine tied around the bottle neck. These are packaged together to make one retail item. One bottle is said to hold cocoa powder, and has a small metal whisk suspended from the twine. It is assumed for the purposes of this ruling that the cocoa powder is, as the name implies, 100 percent cocoa powder. The second bottle contains cinnamon sticks, and has a small metal grater dangling from its neck. The third bottle is described as vanilla sugar, and is said to consist of sugar with added vanilla bean extract and glucose. This bottle has a stainless steel measuring spoon (1 teaspoon) attached to the neck.

The combination of items in Product SA–204129 is not classifiable as a set and therefore each item is classified individually. The applicable subheading for the cinnamon sticks will be 0906.10.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cinnamon and cinnamon-tree flowers: Neither crushed nor ground. The rate of duty will be Free.

It is assumed, for the purposes of this ruling, that the flavored sugar is derived from sugar cane or sugar beet. The applicable subheading for the vanilla sugar, if described in additional U.S. note 3 to chapter 17 and entered pursuant to its provisions, will be 1701.91.5400, Harmonized Tariff Schedule of the United States (HTS), which provides for Cane or beet sugar and chemically pure sucrose, in solid form: Other: Containing added flavoring or coloring matter: Containing added flavoring matter whether or not containing added coloring: Articles containing over 10 percent by dry weight of sugar described in additional U.S. note 3 to chapter 17: Described in additional U.S. note 8 to this chapter and entered pursuant to its provisions. The

rate of duty will be 6 percent ad valorem. If not described in additional U.S. note 3 to chapter 17 and not entered pursuant to its provisions, the applicable subheading will be 1701.91.5800, HTS. The duty rate will be 33.9 cents per kilogram plus 5.1 percent ad valorem. In addition, products classified under subheading 1701.91.5800, HTS, will be subject to additional duties based on their value as described in subheadings 9904.17.49 to 9904.17.56, HTS.

The applicable subheading for the cocoa powder will be 1805.00.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for cocoa powder, not containing added sugar or other sweetening matter. The rate of duty will be 0.52 cents per kilogram.

The applicable subheading for the grater and the metal whisk, if of iron or steel, will be 8205.51.3030, Harmonized Tariff Schedule of the United States (HTS), which provides for Handtools (including glass cutters) not elsewhere specified or included . . . : Other handtools (including glass cutters) and parts thereof: Household tools, and parts thereof: Of iron or steel: Other (including parts) . . . Kitchen and table implements. The rate of duty will be 3.7 percent ad valorem.

The applicable subheading for the stainless steel measuring spoon will be 8215.99.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware and base metal parts thereof: Other: Other . . . Spoons and ladles: With stainless steel handles: Spoons valued under 25 cents each. The rate of duty will be 14 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist John Maria at (646) 733–3031.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY E82964 June 11, 1999
CLA–2–73:RR:NC:N1:113 E82964
CATEGORY: Classification
TARIFF NO.: 7323.93.0060; 8215.99.3000

MR. EDWARD N. JORDAN
EXPEDITORS INTERNATIONAL
601 North Nash Street
El Segundo, CA 90245

RE: The tariff classification of a mix and measure set from India

DEAR MR. JORDAN:

In your letter dated June 2, 1999, on behalf of Metro Thebe, Inc., you requested a tariff classification ruling.

The merchandise is a 9-piece stainless steel mix and measure set (item number 0639). The set consists of a 2-quart mixing bowl, 4 measuring cups on a ring, and 4 measuring spoons on a ring. Your letter indicates that the total value of the four spoons is 50 cents. You asked for the classification of this merchandise when imported as a retail packaged set, and also when the individual components are imported separately. It has been determined that the essential character of the set is imparted by the mixing bowl.

The applicable subheading for the mix and measure set imported together, or the mixing bowl or measuring cups imported separately will be 7323.93.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for table, kitchen or other household articles and parts thereof, of iron or steel, other, of stainless steel, cooking and kitchenware, other, kitchenware. The rate of duty will be 2 percent ad valorem. Articles which are classifiable under subheading 7323.93.0060, HTS, which are products of India are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

The applicable subheading for the measuring spoons imported separately will be 8215.99.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for spoons and ladles, with stainless steel handles, spoons valued under 25 cents each. The rate of duty will be 14 percent ad valorem. This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist James Smyth at 212–637–7008.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY B86306
June 18, 1997
CLA–2–82:RR:NC:1:119 B86306
CATEGORY: Classification
TARIFF NO.: 8215.99.3000

MS. KIM YOUNG
BDP INTERNATIONAL INC.
2721 Walker NW
Grand Rapids, MI 49504

RE: The tariff classification of a measuring spoon set from Taiwan

DEAR MS. YOUNG:

In your letter dated June 3, 1997 you requested a tariff classification ruling on behalf of Meijer Inc., 2929 Walker Road, Grand Rapids, MI 49504.

The merchandise to be imported is a set of four stainless steel measuring spoons graduated in size from 1/4 teaspoon to 1 tablespoon. Based on the breakdown you furnished, all four spoons are valued under 25 cents each.

The applicable subheading for the measuring spoon set will be 8215.99.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for spoons and ladles: with stainless steel handles: spoons valued under 25 cents each. The rate of duty will be 15.2 percent.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Jacques Preston at 212–466–5488.

The sample is being returned to your office as requested.

ROBERT B. SWIERUPSKI,
Chief, Metals & Machinery Branch,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968080
CLA–2 RR:CTF:TCM 968080 HkP
CATEGORY: Classification
TARIFF NO.: 7323.99.9030

MEIJER, INC.
c/o Ms. Kim Young
BDP INTERNATIONAL, INC.
2721 Walker NW
Grand Rapids, MI 49504

RE: Classification of stainless steel measuring spoon set; revocation of NY B86306

DEAR MS KIM:

This is in reference to New York Ruling Letter ("NY") B86306, dated June 18, 1997, in which the tariff classification of stainless steel measuring spoons was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). NY B86306 classified the spoons in heading 8215, HTSUS, which provides for: " Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware". We have reconsidered NY B86306 and have determined that the tariff classification of the measuring spoons is not correct.

FACTS:

In NY B86306, the measuring spoons were described as "a set of four stainless steel measuring spoons graduated in size from 1/4 teaspoon to 1 tablespoon. . . . all four spoons are valued under 25 cents each."

ISSUE:

Whether the stainless steel measuring spoons are classified in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel", or heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware."

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; . . . :
	Other:

7323.99	Other:
	Not coated with precious metal:
	Other:
7323.99.90	Other:
7323.99.9030	Kitchen or tableware suitable for food or drink contact . . . . .
8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof:
	Other:
8215.99	Other:
	Spoons and ladles:
	With stainless steel handles:
8215.99.3000	Spoons valued under 25¢ each . . . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

We first consider classification in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel." Iron or steel measuring spoons are kitchen or household articles and are therefore *prima facie* classifiable in heading 7323, HTSUS. In addition, EN 73.23 provides in pertinent part, that:

> This group comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for table, kitchen or other household purposes; . . .
>
> . . .
>
> The group includes:
>
> (1) Articles for kitchen use such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles; . . . ; kitchen type capacity measures[.]
>
> (Original emphasis.)

However, EN 73.23 indicates that this heading is a "basket" provision, in that, merchandise may only be classified in this heading if not more specifically covered by any other tariff heading.

Next, we consider classification in heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware." Explanatory Note 82.15 provides that:

This heading includes:

(1) Spoons of all kinds including salt or mustard spoons.

(2) Table forks: carving forks, serving forks, cooks' forks; cake forks; oyster forks; snail forks; toasting forks.
(3) Ladles and skimmers (for vegetables, frying, etc.)
(4) Slices for serving fish, cake strawberries, asparagus.
(5) Non-cutting fish knives and butter knives.
(6) Sugar tongs of all kinds (cutting or not), cake tongs, hors-d'oeuvre tongs, asparagus tongs, small tongs, meat tongs and ice tongs.
(7) Other tableware, such as poultry or meat grips, and lobster or unit grips.

The term "spoon" is not defined in the HTSUS or the ENs. A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. Nippon Kogaku (USA) Inc. v. United States, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F.2d 1268 (1982). The Oxford English dictionary (www.askoxford.com) defines a spoon as "an implement consisting of a small, shallow bowl on a long handle, used for eating, stirring, and serving."

"Spoons" is an *eo nomine* provision. An *eo nomine* provision is one that describes merchandise by a specific name that is well known in the trade, and includes all forms of the article as if each were provided for by name in the tariff provisions. Explanatory Note 82.15 states that heading 8215, HTSUS, covers "spoons of all kinds". The Court of International Trade has stated that "[b]readth undermines specificity. Where an *eo nomine* provision encompasses more and more disparate items, almost without limit, it necessarily begins to lose its specificity." Midwest of Canon Falls, Inc. v. United States, 20 C.I.T. 123, 130 (1996). In that case, the court was of the opinion that because the classification "dolls" covered many disparate items, the court could not "accept a blanket rule that every decorative article with some doll-like feature is simply a doll." (quoting Russ Berrie & Co. v. United States, 76 Cust. Ct. 218, at 224–5, 417 F. Supp. 1035 at 1039). Id. So too, in the instant case, we are of the opinion that "spoons" covers many disparate items and that not every article with spoon-like features can be simply classified as a spoon.

Conversely, "kitchen or other household articles" is best described as a use provision because the defining feature of such articles is implied by their use. Additional U.S. Rule of Interpretation (a) states that, in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than by actual use) is to be determined is accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. Explanatory Note 73.23 explains that the articles of heading 7323, HTSUS, are used for kitchen, table and household purposes, and include "kitchen type capacity measures". Based on the exemplars of EN 73.23, we are of the opinion that the principal use of the class of goods to which the measuring spoons belong (kitchen articles) is kitchen use, and in particular, capacity measurement. In addition, we note that this approach is consistent with CPB's classification of measuring spoons of plastic. See **NY L85919**, dated August 3, 2005; **NY D87578**, dated March 2, 1999; **NY 808944**, dated May 4, 1995; and, **NY 888561**, dated August 17, 1993.

HOLDING:

By application of GRI 1 and Additional U.S. Rule of Interpretation (a), HTSUS, we find that measuring spoons are classified in heading 7323, HTSUS, as "Table, kitchen or other household articles and parts thereof, of iron or steel", and are specifically provided for in subheading 7323.99.9030, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel; . . . ; . . . : Other: Other: Not coated with precious metal: Other: Other: Kitchen or tableware suitable for food or drink contact."

The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY B86306, dated June 18, 1997, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT F]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968081
CLA–2 RR:CTF:TCM 968081 HkP
CATEGORY: Classification
TARIFF NO.: 7323.99.9030

MR. SHACHAR GAT
SHONFELD'S USA
3100 South Susan Street
Santa Ana, CA 92704

RE: Classification of stainless steel measuring spoons; modification of NY J87441 and NY J87521

DEAR MR. GAT:

This is in reference to New York Ruling Letters ("NY") J87441 and NY J87521, both dated August 6, 2003, in which the tariff classification of stainless steel measuring spoons was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). NY J87441 and NY J87521 classified the spoons in heading 8215, HTSUS, which provides for: " Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware." We have reconsidered NY J87441 and NY J87521 and have determined that the tariff classification of the measuring spoons is not correct.

FACTS:

In both NY J87441 and NY J87521, the measuring spoons were part of products packaged together to make one retail item, but not classifiable as a set, and marketed as "coffee flavoring" and "coffee toppings", respectively.

The measuring spoons, made of stainless steel and measuring in one-teaspoon increments, were attached to bottles of vanilla sugar.

ISSUE:

Whether the stainless steel measuring spoons are classified in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel", or in heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware."

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; . . . :
	Other:
7323.99	Other:
	Not coated with precious metal:
	Other:
7323.99.90	Other:
7323.99.9030	Kitchen or tableware suitable for food or drink contact . . . . .
8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof:
	Other:
8215.99	Other:
	Spoons and ladles:
	With stainless steel handles:
8215.99.3000	Spoons valued under 25¢ each . . . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

We first consider classification in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel." Iron or steel measuring spoons are kitchen or household articles and

are therefore *prima facie* classifiable in heading 7323, HTSUS. Explanatory Note 73.23 provides in pertinent part, that:

> This group comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for table, kitchen or other household purposes; . . .
>
> . . .
>
> The group includes:
>
> (1) Articles for kitchen use such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles; . . . ; kitchen type capacity measures[.]
>
> (Original emphasis.)

However, EN 73.23 indicates that this heading is a "basket" provision, in that, merchandise may only be classified in this heading if not more specifically covered by any other tariff heading.

Next, we consider classification in heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware." Explanatory Note 82.15 provides that:

This heading includes:

(1) Spoons of all kinds including salt or mustard spoons.
(2) Table forks: carving forks, serving forks, cooks' forks; cake forks; oyster forks; snail forks; toasting forks.
(3) Ladles and skimmers (for vegetables, frying, etc.)
(4) Slices for serving fish, cake strawberries, asparagus.
(5) Non-cutting fish knives and butter knives.
(6) Sugar tongs of all kinds (cutting or not), cake tongs, hors-d'oeuvre tongs, asparagus tongs, small tongs, meat tongs and ice tongs.
(7) Other tableware, such as poultry or meat grips, and lobster or unit grips.

The term "spoon" is not defined in the HTSUS or the ENs. A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. Nippon Kogaku (USA) Inc. v. United States, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F.2d 1268 (1982). The Oxford English dictionary (www.askoxford.com) defines a spoon as "an implement consisting of a small, shallow bowl on a long handle, used for eating, stirring, and serving."

"Spoons" is an *eo nomine* provision. An *eo nomine* provision is one that describes merchandise by a specific name that is well known in the trade, and includes all forms of the article as if each were provided for by name in the tariff provisions. Explanatory Note 82.15 states that heading 8215, HTSUS, covers "spoons of all kinds." The Court of International Trade has stated that "[b]readth undermines specificity. Where an *eo nomine* provision encompasses more and more disparate items, almost without limit, it necessarily begins to lose its specificity." Midwest of Canon Falls, Inc. v. United States, 20 C.I.T. 123, 130 (1996). In that case, the court was of the opinion that because the classification "dolls" covered many disparate items, the court could not "accept a blanket rule that every decorative article with

some doll-like feature is simply a doll." (quoting Russ Berrie & Co. v. United States, 76 Cust. Ct. 218, at 224–5, 417 F. Supp. 1035 at 1039). Id. So too, in the instant case, we are of the opinion that "spoons" covers many disparate items and that not every article with spoon-like features can be simply classified as a spoon.

Conversely, "kitchen or other household articles" is best described as a use provision because the defining feature of such articles is implied by their use. Additional U.S. Rule of Interpretation (a) states that, in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than by actual use) is to be determined is accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. Explanatory Note 73.23 explains that the articles of heading 7323, HTSUS, are used for kitchen, table and household purposes, and include "kitchen type capacity measures". Based on the exemplars of EN 73.23, we are of the opinion that the principal use of the class of goods to which the measuring spoons belong (kitchen articles) is kitchen use, and in particular, capacity measurement. In addition, we note that this approach is consistent with CPB's classification of measuring spoons of plastic. See **NY L85919**, dated August 3, 2005; **NY D87578**, dated March 2, 1999; **NY 808944**, dated May 4, 1995; and, **NY 888561**, dated August 17, 1993.

HOLDING:

By application of GRI 1 and Additional U.S. Rule of Interpretation (a), HTSUS, we find that measuring spoons are classified in heading 7323, HTSUS, as "Table, kitchen or other household articles and parts thereof, of iron or steel", and are specifically provided for in subheading 7323.99.9030, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel; . . . ; . . . : Other: Other: Not coated with precious metal: Other: Other: Kitchen or tableware suitable for food or drink contact."

The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY J87521 and NY J87441, dated August 6, 2003, are hereby modified with respect to the classification of stainless steel measuring spoons. The classification of the remaining items described in NY J87521 and NY J87441, is unchanged.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT G]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 968163
CLA–2 RR:CTF:TCM 968163 HkP
CATEGORY: Classification
TARIFF NO.: 7323.99.9030

MR. EDWARD N. JORDAN
EXPEDITORS INTERNATIONAL
601 North Nash Street
El Segundo, CA 90245

RE: Classification of stainless steel measuring spoons; modification of NY E82964

DEAR MR. JORDAN:

This is in reference to New York Ruling Letter ("NY") E82964, dated June 11, 1999, in which the tariff classification of stainless steel measuring spoons was determined under the Harmonized Tariff Schedule of the United States ("HTSUS"). NY E82964 classified the spoons in heading 8215, HTSUS, which provides for: " Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware." We have reconsidered NY E82964 and have determined that the tariff classification of the measuring spoons, imported separately, is not correct.

FACTS:

NY E82964 stated:

> The merchandise is a 9-piece stainless steel mix and measure set (item number 0639). The set consists of a 2-quart mixing bowl, 4 measuring cups on a ring, and 4 measuring spoons on a ring. Your letter indicates that the total value of the four spoons is 50 cents. You asked for the classification of this merchandise when imported as a retail packaged set, and also when the individual components are imported separately.

ISSUE:

Whether the stainless steel measuring spoons, when imported separately, are classified in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel", or in heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-knives, sugar tongs and similar kitchen or tableware."

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; . . . :
	Other:
7323.99	Other:
	Not coated with precious metal:
	Other:
7323.99.90	Other:
7323.99.9030	Kitchen or tableware suitable for food or drink contact . . . . .
8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof:
	Other:
8215.99	Other:
	Spoons and ladles:
	With stainless steel handles:
8215.99.3000	Spoons valued under 25¢ each . . . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

We first consider classification in heading 7323, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel." Iron or steel measuring spoons are kitchen or household articles and are therefore *prima facie* classifiable in heading 7323, HTSUS. Explanatory Note 73.23 provides, in pertinent part, that:

> This group comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for table, kitchen or other household purposes; . . .
>
> . . .
>
> The group includes:
>
> (1) Articles for kitchen use such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles; . . . ; kitchen type capacity measures[.]
>
> (Original emphasis.)

However, EN 73.23 indicates that this heading is a "basket" provision, in that, merchandise may only be classified in this heading if not more specifically covered by any other tariff heading.

Next, we consider classification in heading 8215, HTSUS, which provides for: "Spoons, forks, ladles, skimmers, cake-servers, fish knives, butter-

knives, sugar tongs and similar kitchen or tableware." Explanatory Note 82.15 provides that:

> This heading includes:
>
> (1) Spoons of all kinds including salt or mustard spoons.
> (2) Table forks: carving forks, serving forks, cooks' forks; cake forks; oyster forks; snail forks; toasting forks.
> (3) Ladles and skimmers (for vegetables, frying, etc.)
> (4) Slices for serving fish, cake strawberries, asparagus.
> (5) Non-cutting fish knives and butter knives.
> (6) Sugar tongs of all kinds (cutting or not), cake tongs, hors-d'oeuvre tongs, asparagus tongs, small tongs, meat tongs and ice tongs.
> (7) Other tableware, such as poultry or meat grips, and lobster or unit grips.

The term "spoon" is not defined in the HTSUS or the ENs. A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. Nippon Kogaku (USA) Inc. v. United States, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F.2d 1268 (1982). The Oxford English Dictionary (www.askoxford.com) defines a spoon as "an implement consisting of a small, shallow bowl on a long handle, used for eating, stirring, and serving."

"Spoons" is an *eo nomine* provision. An *eo nomine* provision is one that describes merchandise by a specific name that is well known in the trade, and includes all forms of the article as if each were provided for by name in the tariff provisions. Explanatory Note 82.15 states that heading 8215, HTSUS, covers "spoons of all kinds." The Court of International Trade has stated that "[b]readth undermines specificity. Where an *eo nomine* provision encompasses more and more disparate items, almost without limit, it necessarily begins to lose its specificity." Midwest of Canon Falls, Inc. v. United States, 20 C.I.T. 123, 130 (1996). In that case, the court was of the opinion that because the classification "dolls" covered many disparate items, the court could not "accept a blanket rule that every decorative article with some doll-like feature is simply a doll." (quoting Russ Berrie & Co. v. United States, 76 Cust. Ct. 218, at 224–5, 417 F. Supp. 1035 at 1039). Id. So too, in the instant case, we are of the opinion that "spoons" covers many disparate items and that not every article with spoon-like features can be simply classified as a spoon.

Conversely, "kitchen or other household articles" is best described as a use provision because the defining feature of such articles is implied by their use. Additional U.S. Rule of Interpretation (a) states that, in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than by actual use) is to be determined is accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. Explanatory Note 73.23 explains that the articles of heading 7323, HTSUS, are used for kitchen, table and household purposes, and include "kitchen type capacity measures". Based on the exemplars of EN 73.23, we are of the opinion that the principal use of the class of goods to which the measuring spoons belong (kitchen articles) is kitchen use, and in particular, capacity measurement. In addition,

we note that this approach is consistent with CPB's classification of measuring spoons of plastic. See **NY L85919**, dated August 3, 2005; **NY D87578**, dated March 2, 1999; **NY 808944**, dated May 4, 1995; and, **NY 888561**, dated August 17, 1993.

HOLDING:

By application of GRI 1 and Additional U.S. Rule of Interpretation (a), HTSUS, we find that measuring spoons are classified in heading 7323, HTSUS, as "Table, kitchen or other household articles and parts thereof, of iron or steel", and are specifically provided for in subheading 7323.99.9030, HTSUS, which provides for: "Table, kitchen or other household articles and parts thereof, of iron or steel; . . . ; . . . : Other: Other: Not coated with precious metal: Other: Other: Kitchen or tableware suitable for food or drink contact."

The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY E82964 is hereby modified with respect to the classification of stainless steel measuring spoons, imported separately. The classification of the remaining items described in NY E82964 is unchanged.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 06–39

HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., Plaintiffs, v. UNITED STATES, Defendant, and INFINEON TECHNOLOGIES, NORTH AMERICA CORP. and MICRON TECHNOLOGY, INC., Defendant-Intervenors.

Before: Richard W. Goldberg,
Senior Judge
Court No. 03–00651

OPINION

[Commerce's remand determination sustained. Previously deferred portions of final affirmative countervailing duty determination sustained.]

Date: March 23, 2006

Willkie, Farr & Gallagher, LLP (*Daniel Lewis Porter, James Philip Durling* and *Matthew Paul McCullough*) for Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*) and *Matthew Dennis Walden*, Office of the Chief Counsel for the Import Administration, U.S. Department of Commerce for Defendant United States.

King & Spalding, LLP (*Gilbert Bruce Kaplan* and *Cris R. Revaz*) for Defendant-Intervenor Micron Technology, Inc.

Collier, Shannon, Scott, PLLC (*Kathleen W. Cannon*) for Defendant-Intervenor Infineon Technologies North America Corp.

Goldberg, Senior Judge: In *Hynix Semiconductor Inc. v. United States*, 29 CIT ___, 391 F. Supp. 2d 1337 (2005) (***"Hynix I"***), familiarity with which is presumed, the Court sustained in part, remanded in part, and deferred reviewing in part the final affirmative countervailing duty determination made by the United States Department of Commerce (**"Commerce"**) regarding dynamic random access memory semiconductors (**"DRAMS"**) from the Republic of Korea (**"Korea"**). *See Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't Commerce

June 23, 2003) (final determination), *amended by* 68 Fed. Reg. 44290 (Dep't Commerce July 28, 2003) (amended final determination) (together, the ***"Final Determination"***). Duly complying with the Court's remand order in *Hynix I*, Commerce issued draft redetermination results on November 3, 2005 and then, after receiving comments from Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (together, **"Hynix"**) and Defendant-Intervenor Micron Technology, Inc. (**"Micron"**), Commerce issued final redetermination results. *See Final Results of Redetermination Pursuant to Remand*, Inv. No. C-580-851 (Nov. 23, 2005), *available at* http://ia.ita.doc.gov/remands/05-106.pdf (the ***"Remand Results"***).

This case is now properly before the Court following remand and the Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). For the reasons that follow, the Court sustains the *Remand Results* and, proceeding to an analysis of the issues previously deferred by the Court, also sustains the remainder of the *Final Determination*.

I. *BACKGROUND*

A. The Court's Decision in *Hynix I*

In *Hynix I*, the Court recognized the novelty of Commerce's invocation of authority under 19 U.S.C. § 1677(5)(B)(iii)[1] for purposes of the *Final Determination*. *Hynix I*, 29 CIT at ___, 391 F. Supp. 2d at 1343. This section of the countervailing duty statute permits Commerce to countervail certain benefit-conferring financial contributions made by private parties pursuant to government entrustment or direction.[2] Invoking this section in the *Final Determination*, Commerce determined that Hynix had received substantial indirect subsidies from the Korean government through a clandestine program of coercing Hynix's creditors to give preferential loans and debt-to-equity swaps during Hynix's ten-month restructuring. *Id.* at ___, 391 F. Supp. 2d at 1340 (*citing* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea, Inv. No. C–580–851, (Dep't Commerce June 16, 2003), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/03-15793-1.pdf (**"Decision Memo"**) at 20–21).

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[1] This section provides, in pertinent part:

> A subsidy is described in this paragraph in the case in which an authority . . .
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or *entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred.*

19 U.S.C. § 1677(5)(B) (1999) (emphasis added).

[2] References to the countervailing duty statute are to the Tariff Act of 1930, as amended by, *inter alia*, the Uruguay Round Agreements Act, 19 U.S.C. §§ 1671 *et seq.*

The Court focused its initial review of the *Final Determination* on Commerce's interpretation and application of the first part of the three-prong statutory test required to prove the existence of these so-called 'entrusted or directed' subsidies: "the making of a *financial contribution* by a private entity to another private entity pursuant to government entrustment or direction." *Id.* at ___ , 391 F. Supp. 2d at 1343 (*citing* 19 U.S.C. § 1677(5)(B)(iii)). The Court held that Commerce's decision to interpret the 'entrusts or directs' language of this prong to include "a single program of financial contributions involving multiple financial institutions directed by a foreign government" was in accordance with law. *Id.* Further, the Court upheld Commerce's methodology for proving such a program of financial contributions, recognizing that the substantial evidence standard "does not require Commerce to produce conclusive evidence of entrustment or direction of each entity involved in each transaction making up an alleged program" under 19 U.S.C. § 1677(5)(B)(iii), so long as "the cumulated evidence and the reasonable inferences drawn therefrom sufficiently connect all the implicated parties and transactions to the alleged program of government entrustment or direction." *Id.*

Nonetheless, the Court remanded the *Final Determination*. Although Commerce provided an extensive explanation of the record evidence which, in the agency's view, demonstrated that the Korean government had both a "*governmental policy* to support Hynix" and "a *pattern of practices* . . . to act upon that policy to entrust or direct" Hynix's creditors, Decision Memo at 49 (emphasis added), the Court found that Commerce had neglected to adequately consider "counterevidence indicating that the transactions making up [the alleged program in this case] were formulated by an independent commercial actor (not a government) and motivated by commercial considerations." *Hynix I* at ___ , 391 F. Supp. 2d at 1343. In the Court's view, the unusual role played by Citibank and its affiliate Solomon Smith Barney (**"SSB"**) in Hynix's restructuring, as well as the apparent presence of commercial options and contingencies in the restructuring, required additional explanation before the Court could proceed with its substantial evidence review of Commerce's financial contribution analysis. *Id.* at ___ , 391 F. Supp. 2d at 1344.

Because the Court remanded to Commerce for further consideration of its threshold financial contribution analysis, the Court deferred review of Commerce's interpretation and application of the other two prongs of the statutory test required to prove the existence of 'entrusted or directed' subsidies: the exercise of a *government subsidy function*[3] in the provision of the investigated financial contribu-

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[3]The Court has adopted this term as a matter of convenience. It is intended to refer to the portion of the statute which states: "if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments[.]" 19 U.S.C. § 1677(5)(B)(iii).

tion and the existence of a *benefit* from that financial contribution to its recipient. *Id.*

B. Commerce's *Remand Results*

In the *Remand Results*, Commerce affirmed its original determination that the Korean government entrusted or directed Hynix's creditors to provide financial contributions within the meaning of 19 U.S.C. § 1677(5)(B)(iii). *Remand Results* at 1.

Considering first whether Hynix's restructuring was in fact orchestrated by a commercial actor rather than the Korean government, Commerce found that Citibank/SSB's role was "quite limited[,]" *id.* at 6, and more akin to that of a "consultant" than orchestrator. *Id.* at 7. While acknowledging that "Citibank/SSB certainly did much of the technical work behind the mechanics of Hynix's financial restructuring[,]" Commerce concluded that "it was the actions taken by the [Korean government] . . . that effectuated the restructuring and brought about the financial contributions." *Id.* at 9. In Commerce's view, Citibank/SSB provided necessary expertise in arranging the complicated financial transactions which comprised Hynix's restructuring, but was able to do so only because the Korean government used its authority to coerce the participation of Korean financial institutions in those highly risky transactions. *Id.* at 7–8. At most, Commerce found that Citibank/SSB's involvement could be seen as "working to assist the creditors make the best out of a bad situation" and not as orchestrating commercially-motivated lending and investment opportunities for Hynix's creditors. *Id.* at 11.

Next considering whether Hynix's restructuring featured commercially-based contingencies and options which belied an inference of government control, Commerce found that no such contingencies or options existed in Hynix's restructuring. *Id.* With regard to the international offering of Hynix's equity (the **"GDS offering"**) made in conjunction with Hynix's May 2001 restructuring, Commerce concluded that the May 2001 restructuring was not "truly contingent upon the GDS offering[.]" *Id.* (quotation marks omitted). Commerce noted that, *before* completion of the GDS offering, Hynix's creditors approved the new loans and debt restructuring included in that transaction, *id.*, and they also entered into a related underwriting agreement. *Id.* at 13. Because Hynix's creditors agreed to important details of the May 2001 restructuring even before the GDS offering closed, Commerce found it "unlikely that the [creditors] were truly waiting until the successful conclusion of the GDS to decide whether to proceed with the May restructuring." *Id.* To further support this view, Commerce noted that the May 2001 restructuring was used as an important selling point in the GDS Offering Memorandum. *Id.* Commerce observed that this memorandum characterized the May 2001 loans and debt restructuring as closing "substantially concurrently" with the closing of the GDS offering period,

"highlighting the automaticity of the assistance agreed to in May" by Hynix's creditors. *Id.* at 12. Commerce also noted that the GDS Offering Memorandum underscored the Korean government's support for Hynix. *Id.* Commerce concluded its analysis of the GDS offering by characterizing it as simply an attempt to share at least some of the financial burden of saving Hynix which had been imposed on Hynix's creditors by the Korean government. *Id.* at 14.

With regard to whether the options provided to creditors participating in Hynix's October 2001 debt restructuring belied an inference of government control, Commerce concluded that the "true nature of the options was to benefit Hynix at the creditors' expense." *Id.* at 15 (quotation marks omitted). Commerce noted that, with regard to this transaction, Hynix's creditors were required to select from among three options developed by Hynix's creditors council. *Id.* These options were: (1) extend new loans to Hynix and convert/renegotiate existing secured and unsecured debt in a manner more advantageous to Hynix; (2) not extend new loans, but convert all secured debt and 28 percent of unsecured debt in a manner more advantageous to Hynix, and forgive the remaining unsecured debt; or (3) exercise appraisal rights for all secured debt and 25 percent of unsecured debt based on Hynix's liquidation value, and forgive the remaining unsecured debt. *Id.* Commerce observed that the third option did not provide for an immediate refund of liquidated loans, but instead called for these liquidated funds to be converted into five-year, interest-free loans to Hynix. *Id.* In Commerce's view, the result to Hynix under any of the options was either complete debt extinguishment or partial debt extinguishment coupled with sufficient new loans to service the remaining debt load – all at the expense of the creditors' balance sheets. *Id.* at 16. Commerce further observed that Hynix's creditors were unhappy with these options, as reported in several contemporaneous news accounts. *Id.* Commerce concluded its analysis of the options featured in the October 2001 restructuring by characterizing them as an attempt to provide Hynix's creditors with some limited flexibility in the manner in which they participated in the government-mandated bailout of the struggling company. *Id.* at 17. In Commerce's view, this flexibility was simply intended to better accommodate the varying levels of investment and financial health of Hynix's beleaguered creditors. *Id.*

Having thus found that Hynix's restructuring "was *not* the product of market forces," Commerce concluded the *Remand Results* by reaffirming its determination that, based on the record evidence,[4] Hynix had been the recipient of government-entrusted or directed financial contributions. *Id.*

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[4]The record evidence adduced by Commerce in support of its finding of government entrustment or direction is discussed in detail *infra*, at Part III.B.1.

C. The Deferred Portions of the *Final Determination*

Commerce appropriately limited the *Remand Results* to the questions concerning its financial contribution analysis raised by the Court in *Hynix I*, relying on its original analysis in the portions of the *Final Determination* deferred by the Court.

In the *Final Determination*, once Commerce found that Hynix had received financial contributions entrusted or directed by the Korean government, Commerce proceeded to the next step in the statutory test to prove their countervailability. Considering the portion of 19 U.S.C. § 1677(5)(B)(iii) that specifies that a financial contribution is only countervailable "if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments," Commerce interpreted this requirement to mean that a "governmental subsidy function" must be performed for an investigated financial contribution to be countervailable. Decision Memo at 47. Applying this statutory interpretation and in light of the evidence before it, Commerce concluded that this requirement had been met. *Id.* at 61.

Commerce then proceeded to the third and final prong of the statutory test for countervailability under 19 U.S.C. § 1677(5)(B)(iii). To countervail an entrusted or directed financial contribution given pursuant to a government subsidy function, Commerce determined that it was statutorily required to establish that the financial contribution conferred a benefit on its recipient. *Id.* at 21. To identify the benefit, if any, received by Hynix during its restructuring, Commerce attempted to compare the investigated financial contributions to commercial benchmarks (*i.e.*, similar loans or equity infusions made by independent actors to Hynix under market conditions). *Id.* at 6–7.

First analyzing the financial contributions received in the form of credit (*i.e.*, preferential loans), Commerce was unable to find any appropriate commercial benchmarks for use in establishing Hynix's creditworthiness.[5] *Id.* at 19–25. To reach this conclusion, Commerce eliminated from consideration Citibank's loans to Hynix. *Id.* at 11. Although concluding that Citibank was independent of government control, *id.* at 8, Commerce disqualified Citibank's loans because (1) Citibank's involvement was relatively small compared to the overall restructuring; (2) Citibank took into consideration the behavior of the government-entrusted or directed financial institutions in order to hedge its lending risk; and (3) Citibank/SSB stood to earn greater fees as Hynix's financial advisor than what other financial institutions could expect from their return on investment in Hynix, thus

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[5] Creditworthiness is a term of art which refers to the "attempt to determine if the company in question could obtain long-term financing from conventional commercial sources" at the time of the government-entrusted or directed loan. Decision Memo at 6; *see also* 19 C.F.R. § 351.505(a)(4) (2005).

skewing Citibank's risk calculus. *Id.* at 9–11. Commerce also disregarded the loans made by Hynix's other creditors, based on their entrustment or direction by the Korean government. *Id.* at 11. Lacking an actual commercial benchmark, Commerce attempted to determine if Hynix was otherwise creditworthy during its restructuring. *Id.* Commerce determined that Hynix was not and constructed a benchmark to calculate the benefit conferred to Hynix by the credit-based financial contributions. *Id.* at 11, 105. Commerce developed this constructed benchmark using Moody's U.S. average cumulative default rates for corporate bonds, instead of default rates specific to Korea which were supplied to Commerce by Hynix during the course of the investigation. *Id.* at 5.

Next analyzing the financial contributions received in the form of equity (*i.e.*, investments), Commerce was similarly unable to identify any commercial benchmarks for use in establishing Hynix's equityworthiness.[6] *Id.* at 91. To reach this conclusion, Commerce again eliminated from consideration Citibank's involvement because, when compared to the size of the investment made by the government-entrusted and directed financial institutions during Hynix's restructuring, Commerce found that Citibank's equity investment in Hynix was not "significant" as required by the countervailing duty regulations.[7] *Id.* at 90 (*citing* 19 C.F.R. § 351.507(a)(2)(iii)). Commerce also disregarded the equity infusions made by Hynix's other creditors, based on their entrustment or direction by the Korean government. *Id.* at 91.

Lacking an actual commercial benchmark, Commerce attempted to determine if Hynix was otherwise equityworthy during its restructuring. *Id.* at 91. As part of that analysis, Commerce considered third party studies of Hynix commissioned by its creditors which discussed Hynix's investment potential at the time of its restructuring. *Id.* Commerce ultimately disregarded these studies, finding that their focus on creditor concerns meant that they did not properly discuss Hynix's future financial prospects or other factors denoting equityworthiness. *Id.* Commerce also questioned the credibility of the methodology and analysis used in some of these reports. *Id.* Further, Commerce found that Hynix's financial indicators for the years 1997 through 2001 were too weak to support a commercially reasonable investment decision at that time. *Id.* at 92. To reach this conclusion, Commerce applied an economic theory known as the Expected Utility Model, which posits that a rational investor focuses on future

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[6] Equityworthiness is a term of art which refers to the attempt to determine if the company in question could, "from the perspective of a reasonable private investor" at the time of the government-entrusted or directed equity infusion, show "an ability to generate a reasonable rate of return within a reasonable time." Decision Memo at 6; *see also* 19 CFR § 351.507(a)(4) (2005).

[7] References to the countervailing duty regulations are to 19 C.F.R. § 351.101 *et seq.*

profitability and does not let the value of past investments in a company affect future investment decisions in that same company. *Id.* Ultimately finding that Hynix was unequityworthy during its restructuring, Commerce calculated the benefit conferred to Hynix by the equity-based financial contributions. *Id.*

Based on the foregoing findings and analysis, Commerce determined that the three-prong statutory test had been met and made a final affirmative countervailing duty determination. *Final Determination*, 68 Fed. Reg. 37122, 37122.

II. *STANDARD OF REVIEW*

The Court must sustain any determination, finding, or conclusion made by Commerce in the *Final Determination* and the *Remand Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999). The Court must also defer to an agency's reasonable construction of an ambiguous statute. *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1343 (Fed. Cir. 2004) (*citing Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Further, "[t]he deference granted to the agency's interpretation of the statutes it administers extends to the methodology it applies to fulfill its statutory mandate." *GMN Georg Muller Nurnberg AG v. United States*, 15 CIT 174, 178, 763 F. Supp. 607, 611 (1991) (*citing*, *inter alia*, *Chevron*, 467 U.S. at 844–45; *Amer. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986)). "Likewise, the [C]ourt may defer to an agency's interpretation of an ambiguous regulation, so long as that interpretation is not plainly erroneous or inconsistent with the regulation, does not fail to reflect the 'agency's fair and considered judgment on the matter in question,' or, if adopted, does not render the regulation unreasonable or otherwise not in accordance with law." *Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ___, ___, 391 F. Supp. 2d 1298, 1304 (2005) (*quoting Auer v. Robbins*, 519 U.S. 452, 462 (1997) (citations omitted)).

III. *DISCUSSION*

A. Summary of Analysis

This case is before the Court for review of Commerce's determination that Hynix received a countervailable benefit from the Korean government through a program of indirect subsidies of the type described in 19 U.S.C. § 1677(5)(B)(iii). For the reasons that follow, the Court concludes that Commerce has satisfied the requirements of the applicable three-prong statutory test in reaching this determination.

First, Commerce adduced substantial evidence in support of its finding that the Korean government entrusted or directed certain financial institutions to provide preferential loans and equity infu-

sions to Hynix during its restructuring. Although Commerce did not provide conclusive evidence for each party or each transaction involved in the program, the agency's circumstantial and direct evidence (and the reasonable inferences drawn therefrom) adequately connected the various financial institutions involved in Hynix's multi-phase restructuring to the Korean government's anticompetitive involvement. Counterevidence offered by Hynix does not undermine the agency's substantiated factual finding.

Second, Commerce's interpretation of the second prong of the statutory test, concerning the performance of a government subsidy function in connection with the entrusted or directed financial contributions, is in accordance with law. Commerce's interpretation appropriately narrows the reach of the countervailing duty statute to only those government actions which involve the delegation of a subsidy function to a private entity. Applying this interpretation, Commerce adduced substantial evidence demonstrating that the Korean government delegated its subsidy function to Hynix's creditors.

Finally, Commerce met the third prong of the statutory test by demonstrating that Hynix received a benefit from the credit and equity-based financial contributions provided by its creditors at the behest of the Korean government. In making this assessment, Commerce appropriately considered the suitability of commercial benchmarks provided by Citibank's loans and equity infusions in Hynix and reasonably concluded that Hynix was neither creditworthy nor equityworthy at the time of its restructuring. Commerce also acted within its authority when establishing an uncreditworthy benchmark for Hynix.

As a result, the Court sustains both the *Remand Results* and the remainder of the *Final Determination*. The Court's conclusions are discussed more fully below.

B. Commerce's Financial Contribution Analysis Is Supported by Substantial Evidence

Hynix argues that the record evidence in this case does not support Commerce's conclusion that Hynix received entrusted or directed financial contributions during its restructuring. First, Hynix claims that the various pieces of evidence in support of Commerce's conclusion were seriously flawed and insufficient to establish a program of entrustment or direction under the substantial evidence standard. Plaintiffs' Memorandum in Support of Its Rule 56.2 Motion for Judgment on the Agency Record (**"Pls.' Br."**) at 17–25, 29–33. Second, Hynix contends that Commerce's proffered evidence was in fact rebutted by counterevidence firmly establishing that an independent third party (not the Korean government) orchestrated Hynix's restructuring and included commercial options and contingencies in that restructuring. *Id.* at 11–16, 25–29.

For the reasons that follow, the Court upholds Commerce's conclusion that Hynix received government-entrusted or directed financial contributions as supported by substantial evidence.

1. Record Evidence Supports Commerce's Conclusion That Hynix Received Entrusted or Directed Financial Contributions

Notwithstanding Hynix's specific evidentiary arguments (discussed below), the Court finds that the record supports Commerce's conclusion that Hynix received financial contributions from private entities entrusted or directed by the Korean government.

To support its factual finding of government entrustment or direction, Commerce adduced circumstantial and direct evidence of the Korean government's motive, proclivity, opportunity, and capacity to support Hynix through private entities. For example, Commerce cited persuasive evidence indicating that the Korean government had a policy of supporting Hynix and, therefore, a *motive* to entrust or direct private entities to participate in Hynix's restructuring. Commerce noted that, in a 2001 statement, a member of the Korean president's staff stated that Hynix was part of a strategically important domestic industry which "should not be sold off just to follow market principles." Decision Memo at 49; *see also* Appendix to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Administrative Record (**"Def.'s App."**), App. 5 (Ex. C–20 of Petitioner's Comments to Commerce dated Mar. 14, 2003) at 17. Commerce further noted that, in a 2002 exchange between the Korean president and a member of Korea's National Assembly, the assembly member criticized Korea's president for compelling financial institutions to provide Hynix "astronomical sums of special support . . . by mobilizing the resources of financial and government-run institutions." *Id.* at 50; *see also* Def.'s App., App. 5 (Ex. C–20 of Petitioner's Comments to Commerce dated Mar. 14, 2003) at 17. The official presidential response to this statement was: "[w]e are doing what is deemed necessary to save companies leading the countries [sic] strategic industries." Decision Memo at 50. Even if this exchange was political banter as asserted by Hynix, *see* Pls.' Br. at 17–18, Commerce reasonably found it telling that the presidential response did not deny the allegation of an official policy of supporting Hynix. *Cf. United States v. Hale*, 422 U.S. 171, 176 (1975) (in criminal context, "[s]ilence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation"). Here, "it would have been natural under the circumstances" for the Korean executive branch to object to an unfounded public accusation of large-scale government waste. *Hale*, 422 U.S. at

176. This exchange, particularly when read together with the 2001 presidential statement,[8] gave rise to a reasonable inference by Commerce that the Korean government maintained a policy to financially support Hynix.[9]

Commerce's evidence also demonstrated a strong *proclivity* on the part of the Korean government to support Hynix through private entities. During the early stages of Hynix's restructuring, record evidence showed that the Korean government's Economic Ministers met to discuss possible measures to alleviate Hynix's liquidity problems. Decision Memo at 50. The execution of the Ministers' decisions was delegated to government agencies, including the Korea Export Insurance Corporation (**"KEIC"**), which was advised by the Economic Ministers that the decisions should be "carried out perfectly." *Id.* at 51; *see also* Def.'s App., App. 5 (Ex. C–20 of Petitioner's Comments to Commerce dated Mar. 14, 2003) at 17. The agencies then took two measures: (1) they waived certain regulatory requirements to enable Hynix's creditors to increase the credit extended to Hynix and (2) they resumed providing insurance for certain financing transactions undertaken by Hynix and its creditors. Decision Memo at 51–52. Commerce reasonably found that these measures enabled Hynix's creditors to participate in the company's restructuring. *Id.* at 50–51. In other words, early in Hynix's restructuring, the Korean government demonstrated an inclination for using private entities to achieve its policy of supporting Hynix. This early demonstration was followed by the creation of a government-run bond placement program used by Hynix's creditors to extend/refinance credit at a time in which the maturation of existing bonds threatened Hynix's default. *Id.* at 52. Although this so-called KDB Fast Track program was non-compulsory and open to firms other than Hynix, *see* Pls.' Br. at 21, it was used predominantly by Hynix's creditors. Decision Memo at 52. This "more than coincidental" participation reasonably led Commerce to characterize the program as a further demonstration of

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[8] Hynix contends that the 2001 presidential statement is suggestive only of a possible motive for the Korean government to intervene and does not indicate the formulation of an affirmative government support policy toward Hynix. Pls.' Br. at 17. This is one possible reading of that statement. However, "the evidence on which the agency relies does not exist in a vacuum." *Former Employees of Int'l Bus. Mach. v. United States Sec'y of Labor*, 29 CIT ____, ____, 403 F. Supp. 2d 1311, 1324 (2005). Commerce was entitled to consider the statement in conjunction with other evidence and draw reasonable inferences therefrom.

[9] The Court shares Hynix's concerns about Commerce's third piece of governmental policy evidence, concerning the existence of a more general Korean government policy to support the restructuring process of major Korean companies. *See* Pls.' Br. at 18. In the Decision Memo, Commerce failed to cite to any record evidence to support this specific contention. *See* Decision Memo at 50. Without record support, this observation smacks of bootstrapping by the agency. Nonetheless, the other evidence cited by Commerce supports the inference of the existence of a governmental policy to support Hynix.

the Korean government's encouragement of private entity involvement in Hynix's restructuring.[10] *Id.*

Further, evidence concerning Hynix's creditors council demonstrated that the Korean government had ample *opportunity* to entrust or direct private entities during the later phases of Hynix's restructuring.[11] Hynix's creditors council was comprised of the same financial institutions which participated in each phase of Hynix's restructuring. Decision Memo at 53–54. A majority of Hynix's outstanding debt was held by financial institutions with varying degrees of government ownership. *Id.* These debt levels translated to voting interests on the creditors council in an amount sufficient to influence the plans approved by the council and to veto any undesirable proposals. *Id.* at 54–55. Commerce found that, by virtue of its ownership interests in voting members of the creditors council, the Korean government could have had a unique vantage point from which to orchestrate Hynix's restructuring using the private entities on Hynix's creditors council. *Id.* This inference is reasonable. If the Korean government's ownership interests in certain Hynix creditors gave the government the ability to influence or direct decisions taken by those financial institutions,[12] then the dominant presence of financial institutions with government ownership could have given the Korean government the opportunity to have a pervasive

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[10] Hynix correctly notes that evidence concerning regulatory waivers, a government-backed insurance program, and a government-backed bond conversion program did not demonstrate an inclination by the Korean government to involve private entities in Hynix's restructuring in a manner at odds with the countervailing duty law. *See* Pls.' Br. at 19–20. Similarly, this evidence did not establish that the Korean government affirmatively caused any of Hynix's creditors to participate in the multiple facets of Hynix's restructuring. *See id.* What Hynix fails to recognize is that this evidence did demonstrate the willingness of the Korean government to take action to involve private entities in Hynix's restructuring. Commerce could reasonably consider this evidence for that purpose. *See* Decision Memo at 52 (noting that the Korean government took measures "that would facilitate the new loans from the company's key creditors").

[11] The formation of the creditors council was predated by the first major phase in Hynix's restructuring, a December 2000 syndicated loan. Pls.' Br. at 32. Hynix correctly notes that, as a result, any opportunity presented by the creditors council could not have applied to this early stage of Hynix's restructuring. *Id.* However, as Hynix also notes, "[t]he October 2001 restructuring . . . alone account[ed] for about two-thirds of the total alleged subsidy[.]" *Id.* at 13. In other words, it was reasonable for Commerce to find the evidence related to the creditors council highly probative even if the temporal reach of this evidence was somewhat limited.

[12] It is noteworthy that evidence concerning government ownership interests in certain of Hynix's creditors cannot be considered conclusive proof of Korean government entrustment or direction of these entities. Rather, as argued by Hynix, these financial institutions are subject to the same inquiry as all other private entities under investigation. *See* Pls.' Br. at 24. Contrary to Hynix's contention, Commerce recognized this fact in its Decision Memo, noting that financial institutions were not presumed to be under government entrustment or direction simply by virtue of government ownership interests. Decision Memo at 17. The evidence which led Commerce to find that these entities were in fact subject to government entrustment or direction is discussed by the Court later in this section.

influence on the decision-making of Hynix's creditors on the creditors council.

Commerce also adduced evidence indicating that the Korean government *recognized the opportunity* to exert influence or control over private entities which was presented by the creditors council. Commerce learned during verification that a government official attended a March 2001 creditors council meeting "to urge creditor banks to execute the resolutions made by creditors." Decision Memo at 59; *see also* Def.'s App., App. 30 (Korean Government Verification Report dated May 15, 2003) at 19. In addition, the Korean government later enacted a new law requiring all creditor financial institutions to attend creditors council meetings for any major corporate restructuring, such as Hynix's. *Id.* A government official quoted in a July 2001 *Korea Times* article cited by Commerce explained that the purpose of the new law was "to prevent some of [the creditors] from refusing to attend [meetings] and pursuing their own interests by taking advantage of bailout programs[.]" *Id.* at 59. From this evidence, Commerce could reasonably find that the Korean government recognized that the creditors council was a possible forum to both communicate and effectuate its Hynix support policy through private entities.

Moreover, Commerce's evidence demonstrated that the Korean government had the *capacity* to act on the opportunity for entrustment or direction of private entities which was presented by its ownership interests in financial institutions on Hynix's creditors council. For example, Commerce cited various contemporaneous Korean newspapers and international financial publications which reported that the Korean government influenced at least three of Hynix's creditors with substantial government ownership. Decision Memo at 56. Specifically, Commerce cited a January 2002 *Business Week* article which reported that the Korean government forced Woori Bank, the Korean Exchange Bank (**"KEB"**), and ChoHung Bank to provide significant funding to Hynix. *Id.* An October 2001 *Korea Times* article reported that a KEB official had confirmed that the Korean government was "working out a series of powerful measures to ensure the survival of [Hynix.]" *Id.* Commerce also cited a September 2001 *Asiamoney* article which discussed general suspicions that banks with substantial government shareholdings were being pressured by the Korean government to support Hynix. *Id.*

Additional reports cited by Commerce indicated that the Korean government had the capacity to influence even those members of Hynix's creditors council without significant government ownership. For example, Commerce cited to a *Dow Jones International* article which reported that KorAm Bank reversed its decision not to participate in a portion of Hynix's May 2001 restructuring after the Korean government's Financial Supervisory Service (the **"FSS"**) warned of possible sanctions if it did not participate. Decision Memo at 59.

Commerce also cited to a *Korea Herald* article which reported that the FSS had threatened to fine Hana Bank if it did not provide emergency liquidity to HPC, a Hynix affiliate. *Id.* at 60. Taken together, Commerce reasonably viewed these news reports as circumstantial evidence suggesting that the Korean government was able to influence or coerce private entities – with and without government ownership – to support Hynix's restructuring.

Commerce was able to further support the inference of Korean government capacity to influence private entities with additional evidence drawn from the opinions of the independent Korean financial experts interviewed during verification. Commerce noted that "the clear consensus that emerged from the independent financial sector experts . . . was that the [Korean government] can and does influence" financial institutions owned whole or in part by the government. Decision Memo at 53–54 n.20. With regard to financial institutions free of government ownership, Commerce also observed that while "many experts interviewed suggest[ed] that the [Korean government] no longer had control over the private banks the way it had in the past[,] . . . at least one expert did comment that government influence over the private banks has continued." *Id.* at 57. Upon a review of the entire summary of the financial expert interviews as urged by Hynix, *see* Pls.' Br. at 25, the Court finds that this evidence supports Commerce's inference that the Korean government could have exercised a degree of influence over the financial institutions involved in Hynix's restructuring. *See* Appendix to Plaintiffs' Motion for Judgment on the Administrative Record (**"Pls.' App."**), App. 6 (Private Financial Experts Verification Report dated May 15, 2003). Although the opinions of the independent Korean financial experts were far from unanimous or conclusive on the question of the Korean government's ability to effectuate its Hynix support policy through private financial institutions, *see id.* at 3, 12; Pls.' Br. at 22, this evidence lent some additional support for Commerce's inference that the Korean government had the capacity to entrust or direct the private financial institutions that participated in Hynix's restructuring.

Commerce built on its evidence of the Korean government's capacity to influence financial institutions with government ownership by specifically examining actions taken with respect to the KEB. Formerly a fully government-owned bank, the KEB was Hynix's principal creditor. Decision Memo at 56. Because the Korean government remained the KEB's largest shareholder with about 43% of the bank's shares, certain of the financial experts interviewed by Commerce contended that the KEB was still subject to government influence over lending decisions. *Id.* at 55–56. Indeed, official correspondence sent to the KEB from the Korean government's Economic Ministers advised the bank to "carr[y] out perfectly" their decisions to support Hynix. *Id.* at 50. Commerce could reasonably find it tell-

ing that, as discussed above, these were the same instructions sent by the Economic Ministers to a Korean government agency. Further, confidential internal loan documentation obtained by Commerce at verification also indicated that the KEB took into account non-commercial, economic and social policy considerations when it chose to participate in various stages of Hynix's restructuring. *Id.* at 55–56; Pls.' App., App. 7 (Hynix Verification Report dated May 15, 2003) at 15, 17. This evidence also indicated that the KEB shared these considerations with Hynix's creditors council. *Id.* In the Court's view, Commerce reasonably found this evidence to be a demonstration of the Korean government's influence on the KEB's decision to provide credit and equity to Hynix. It is indeed suspect for an allegedly independent financial institution to consider the ramifications of isolated lending and investment decisions on the economic and social health of a country, rather than that institution's bottom line. Commerce reasonably found that this was not normal behavior for a profit-maximizing market actor. *Cf. Nelson v. Pilkington PLC*, 385 F.3d 350, 360–61 (3d Cir. 2004) (in antitrust context, noting that "[e]vidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market. Put differently . . . a court looks to evidence that the market behaved in a noncompetitive manner.") (quotation marks omitted). Based on this evidence, Commerce was justified in finding that "the very commercial nature which Hynix states motivated the KEB is fundamentally called into question." Decision Memo at 57.

Commerce also found evidence of Korean government entrustment or direction with respect to Kookmin Bank (**"Kookmin"**), a Korean commercial financial institution without substantial government ownership. Commerce initially cited a September 2001 certified filing made by Kookmin to the U.S. Securities and Exchange Commission (**"SEC"**). *Id.* at 57. In that filing, Kookmin warned its investors that:

> The [Korean government] has promoted, and, as a matter of policy may continue to attempt to promote certain lending to certain types of borrowers. It generally has done this by requesting banks to participate in remedial programs for troubled corporate borrowers. . . . The government has in this manner promoted low-mortgage lending and lending to technology companies. We expect that all loans made pursuant to government policies will be reviewed in accordance with [Kookmin's] credit review policies. However, *we cannot assure you that government policy will not influence [Kookmin] to lend to certain sectors or in a manner in which [Kookmin] otherwise would not in the absence of government policy.*

Id. at 57–58 (emphasis added); *see also* Def.'s App., App. 12 (Attach. 1 of Petitioner's Comments to Commerce dated Mar. 28, 2003) at 22.[13] In the Court's view, Commerce reasonably found that this filing served as an admission by a Hynix creditor of the tendency of the Korean government to direct private banks to provide financial contributions to technology companies, such as Hynix.[14] To tie this tendency specifically to Hynix's restructuring, Commerce then cited confidential internal loan documentation obtained from Kookmin at verification which indicated that, as warned in its SEC filing, Kookmin took into account Korean government policy goals when weighing its participation in Hynix's December 2000 syndicated loan. Decision Memo at 59; *see also* Def.'s App., App. 11 (Ex. 11 of Hynix Verification Report dated May 15, 2003) at 12. Taken together, Commerce reasonably found that this evidence demonstrated that the Korean government was successful in enlisting Kookmin, a financial institution without substantial government ownership, to support Hynix during its restructuring.

In sum, the Court concludes that record evidence supports Commerce's determination that Hynix received financial contributions from private entities entrusted or directed by the Korean government. As the foregoing discussion demonstrates, Commerce did not rely on "past findings" from earlier countervailing duty investigations involving the Korean government to support its finding of government entrustment or direction. Pls.' Br. at 10. Rather, Commerce appropriately "point[ed] to evidence from which it [was] reasonable to infer that the government's control continued into the period of investigation." *AK Steel Corp. v. United States*, 192 F.3d 1367, 1376 (Fed. Cir. 1999).

2. Counterevidence Adduced by Hynix Does Not Undermine Commerce's Conclusion That Hynix Received Entrusted or Directed Financial Contributions

Of course, the Court's substantial evidence review does not end with an examination of the evidence supporting Commerce's finding. The Court must also consider whatever "fairly detracts from the sub-

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[13] Kookmin also filed a similar prospectus in June 2002. Decision Memo at 58. Because Kookmin was the sole Korean bank listed on a U.S. stock exchange during the period of investigation, no other such SEC filings were made by Hynix's creditors. *Id.*

[14] Hynix argues that Commerce failed to consider "a detailed statement by the specific lawyers who drafted the prospectus, which made clear that the language was in no way meant to imply [Korean government] control over Kookmin lending decisions." Pls.' Br. at 32 (*citing* Pls.' App., App. 16 (Hynix's Supporting Documentation dated Apr. 14, 2003)). However, "absent a showing to the contrary, [the agency] is presumed to have considered all of the evidence in the record." *Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 779, 696 F. Supp. 642, 648 (1988). Hynix has failed to rebut this presumption here; Commerce is not required to expressly distinguish every post hoc, self-serving declaration offered by a party which is facially at odds with the plain meaning of non-technical record evidence.

stantiality of [that] evidence." *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quotation marks omitted). Hynix argues that counterevidence on the record soundly refutes Commerce's finding of Korean government entrustment or direction of the financial institutions involved in Hynix's restructuring.

First, Hynix argues that Citibank/SSB, not the Korean government, was responsible for orchestrating Hynix's restructuring. Pls.' Br. at 11–16, 25–29. Hynix contends that Citibank/SSB initiated and was at the center of Hynix's multifaceted restructuring, both as an advisor and participant. Plaintiffs' Comments on the Final Results of Redetermination (**"Pls.' Remand Comments"**) at 7. In these roles, Hynix notes that Citibank/SSB was found not to be under Korean government control. *Id.* at 9 (*citing* Decision Memo at 5). Further, Hynix observes that SSB's engagement letter and restructuring proposals recognized that the Korean government might not provide the regulatory flexibility needed to make Hynix's restructuring successful. *Id.* at 10–11. Hynix additionally notes that Citibank committed its own funds to Hynix's restructuring. *Id.* at 12–13. Taken together, Hynix argues that the evidence concerning Citibank/SSB's commercial involvement demonstrated the independence of Hynix's restructuring from the Korean government. *Id.* at 12–13.

The Court finds that the evidence of Citibank/SSB's involvement in Hynix's restructuring is insufficient to undermine Commerce's finding of government entrustment or direction. The parties agree that, while important to the restructuring from a technical perspective, SSB did not have the ability to ensure the participation of Hynix's creditors in the various phases of Hynix's restructuring. *See Remand Results* at 7; Pls.' Remand Comments at 8. In other words, for SSB's restructuring blueprint to work, Hynix's creditors had to participate – either voluntarily or through government coercion. Hynix places great emphasis on the fact that Citibank/SSB, as demonstrated by its proposals to Hynix's creditors and affidavits to Commerce, believed that commercial persuasion (not government coercion) was the motivating force behind creditor participation. Indeed, this rightfully is circumstantial evidence that weighs against Commerce's determination. However, even the documents cited by Hynix acknowledge that the restructuring devised by SSB was subject to some form of Korean government approval. *See Remand Results* at 8. Regardless, Citibank/SSB's view of the nature of the Korean government's involvement in Hynix's restructuring or the reasons for creditor involvement is but one of the opinions collected by Commerce during its investigation. Considering the totality of the evidence before the agency, which included reports of behind-the-scenes

Korean government coercion by numerous independent sources,[15] Commerce reasonably chose to disbelieve the minority view of Citibank/SSB.

Further, this choice by the agency was not significantly undercut by evidence of Citibank's own financial participation in Hynix's restructuring. As discussed in greater detail *infra* at Part III.D.1.a, Commerce found that Citibank purposefully waited until the involvement of the other creditors was assured before committing resources to Hynix's restructuring. The important point for Citibank was the participation of the other creditors – not their rationale (or provocation) for doing so. Citibank's "symbolic gesture" of support for Hynix (and, by extension, the potentially marketable Korean corporate restructuring blueprint represented by Hynix), Decision Memo at 9–10, was therefore minimally probative on the question of the true nature of the Korean government's role in the restructuring. As such, it was reasonable for Commerce to find that Citibank/SSB's involvement did not negate the existence of government entrustment or direction in Hynix's restructuring.

Second, Hynix contends that Hynix's restructuring included commercial options and contingencies which belie a finding of government entrustment or direction. Pls.' Remand Comments at 13–20. With regard to the May 2001 phase of Hynix's restructuring, which featured an international GDS offering, Hynix argues that the provisions of this offering demonstrate that the success of Hynix's restructuring depended on the support of international investors – not the Korean government. *Id.* at 13. Hynix contends that, because the record evidence demonstrates that the May 2001 restructuring was contingent on commercial action, Hynix's restructuring had to have been independent from the Korean government. *Id.* at 16.

The Court finds that the inclusion of the GDS offering in the May 2001 restructuring is also insufficient to undermine Commerce's finding of government entrustment or direction. Record evidence shows that Hynix's creditors voted to provide the new loan and debt restructuring package featured in the May 2001 restructuring before the GDS offering even began. *Remand Results* at 12. While the GDS offering was underway, an offering memorandum was circulated to

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[15] As noted by Commerce, when investigating an alleged clandestine program of subsidization, "secondary sources can be particularly credible as these observers are independent and without a vested interest in the outcome." Decision Memo at 50 n.13. Of course, secondary information is not necessarily reliable in all circumstances, which is why the countervailing duty statute requires Commerce to corroborate such information to the extent practicable. *See* 19 U.S.C. § 1677e(c) (1999). Commerce duly carried out its duty to corroborate during the underlying investigation; however, even more telling, Hynix itself has urged both Commerce and the Court to look to "reliable outside commentary" when analyzing the role played by the Korean government in Hynix's restructuring. Pls.' Br. at 31. While the commentary collected by Commerce during its investigation was hardly unanimous, *see id.*, much (if not the majority) lends support to Commerce's finding of government entrustment or direction.

potential investors, characterizing the May 2001 package as one of the "Concurrent Financing Transactions" central to Hynix's overall restructuring. *Id.*; *see also* Pls.' App., App. 1C (Ex. 5 of Hynix Questionnaire Resp. dated Jan. 27, 2004). Then, before the GDS offering closed, Hynix's creditors met again to work out important details of the restructuring package. *Remand Results* at 13. Based on the timing of the creditors' agreements and the characterization of the restructuring package in the offering memorandum, Commerce found it "unlikely that the banks were truly waiting until the successful conclusion of the GDS to decide whether to proceed with the May restructuring." *Id.* Hynix looks to the same evidence and finds that it supports the opposite inference – that the May 2001 restructuring package was contingent on approval by international investors and not the Korean government. Pls.' Remand Comments at 13–16. Upon a careful review of the record evidence, the Court is forced to conclude that both interpretations of the documents related to the May 2001 restructuring are equally plausible. Faced with this equipoise, the Court must defer to the interpretation made by Commerce as the agency expert. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962) (noting that "[e]xpert discretion is the lifeblood of the administrative process"). As such, it was reasonable for Commerce to find that the GDS offering featured in Hynix's May 2001 restructuring did not negate the existence of government entrustment or direction.

Hynix next argues that, with regard to the October 2001 phase of Hynix's restructuring, the existence of multiple options available to creditors (including debt liquidation) negates government control. Pls.' Remand Comments at 17. Hynix notes that these options were adopted by a vote of Hynix's creditors council – a vote which required the support of the holders of at least seventy-five percent of Hynix's outstanding debt. *Id.* Hynix contends that Commerce failed to demonstrate that the Korean government had control over creditors holding this amount of Hynix's debt. *Id.* According to Hynix, at best Commerce showed that the Korean government had ownership interests in certain Hynix creditors, but that even these creditors did not hold the requisite seventy-five percent of Hynix's outstanding debt. *Id.* at 18. Hynix contends that, as a result, the Korean government was simply not in a position to force Hynix's creditors to follow any course of action - as reflected in the availability of multiple options during the October 2001 restructuring. *Id.* at 19.[16]

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[16] Hynix also argues that Commerce ignored the fact that Hynix's creditors had a statutory right to seek outside mediation concerning the terms for Hynix's October 2001 restructuring set by the creditors council. Pls.' Remand Comments at 17. In Hynix's view, recourse to mediation contradicts a finding of any sort of Korean government control over these financial institutions. *Id.* This is an interesting argument; unfortunately, it does not appear that it was made by Hynix during the administrative proceedings below. *See* Micron's Rebuttal Comments on the Final Results of Redetermination at 12–13. It is well established

The Court finds that the inclusion of multiple options in the October 2001 restructuring is insufficient to undermine Commerce's finding of government entrustment or direction. In the *Remand Results*, Commerce provided a more detailed explanation of the options made available to creditors during the last stage of Hynix's restructuring. Although these options offered varying degrees of continued involvement in Hynix, none of the options provided an immediate refund of liquidated loans to creditors. *Remand Results* at 15. Instead, even under the option most favorable to a creditor seeking to extricate itself from the restructuring, funds from the liquidated loans were converted back into five-year, interest free loans to Hynix. *Id.* Under any scenario, Hynix stood to benefit from either complete debt extinguishment or partial debt extinguishment coupled with sufficient new loans to service the remaining debt. *Id.* at 16. These were the options presented to Hynix's creditors, notwithstanding the fact that the October 2001 restructuring was an "unforeseen event, made necessary by an unexpected slump in the DRAM market" – in other words, made necessary by Hynix's still worsening financial position. Pls.' Br. at 12. While it is hard to imagine what a good set of options might have been for Hynix's creditors in this situation, *see* Pls.' Remand Comments at 19, it is suspect that "under any scenario, Hynix would be saved to the detriment of its creditors." *Remand Results* at 16. Viewed in this light, Commerce reasonably found that the October 2001 restructuring options were not commercial in nature and, therefore, did not contradict a finding of government entrustment or direction.

In reaching this conclusion, the Court rejects Hynix's chief rejoinder – that Commerce failed to demonstrate that the Korean government had control over a sufficient percentage of the creditors council in order to vote into place any sort of non-commercial options. *See* Pls.' Remand Comments at 17. As the Court found above in Part III.B.1, Commerce did in fact adduce evidence supporting its conclusion that the Korean government was able to influence or coerce multiple members of Hynix's creditors council, both with and without government ownership. Further, the very existence of the highly suspect options featured in the last restructuring phase actually reinforces Commerce's determination that government entrustment or direction persisted for the duration of the alleged ten-month program.

The Court recognizes that this last piece of circumstantial evidence – like each set of evidence related to the Korean government's motive, proclivity, opportunity, and capacity to support Hynix in a

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that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented. . . ." *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946); *see also* 28 U.S.C. § 2637(d) (1999) (requiring exhaustion of administrative remedies where appropriate).

manner at odds with the countervailing duty statute – would fall short of meeting the substantial evidence standard if viewed in isolation. Hynix has ably demonstrated as much throughout its briefing. Unfortunately for Hynix, this observation is of no moment. Commerce need not exclusively rely on any one piece or set of evidence to prove entrustment or direction. Rather, Commerce must show through the totality of its evidence that entrustment or direction has taken place. *See Hynix I* at ___ , 391 F. Supp. 2d at 1349. Commerce has done so here. Through its substantial direct and circumstantial evidence, Commerce has "connect[ed] ostensibly disparate parties and transactions to a single, interrelated program of government entrustment or direction." *Id.* at ___ , 391 F. Supp. 2d at 1350.

Admittedly, Commerce's finding of government entrustment or direction here is not without some doubt. This is a close case. In such circumstances, however, "the Court may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views[.]" *S.F. Candle Co. v. United States*, 27 CIT ___, ___ , 265 F. Supp. 2d 1374, 1381 (2003) (quotation marks omitted). Accordingly, the Court upholds Commerce's conclusion that Hynix's creditors were entrusted or directed by the Korean government to provide financial contributions to Hynix as supported by substantial evidence.

C. Commerce's Government Subsidy Function Analysis Is In Accordance with Law and Supported by Substantial Evidence

Hynix next argues that Commerce wrongly concluded that the prong of 19 U.S.C. § 1677(5)(B)(iii) pertaining to the performance of a government subsidy function was satisfied in connection with the investigated financial contributions. Pls.' Br. at 33 (*citing* Decision Memo at 47). Hynix asserts that, as a matter of law, actions taken by a wholly independent actor cannot possibly be actions or practices normally vested in or followed by governments – the standard established by the relevant portion of 19 U.S.C. § 1677(5)(B)(iii). *Id.* at 33–34. Hynix contends that Commerce erred by ignoring the close parallels between the actions of Citibank, a concededly independent commercial actor, and other creditors deemed to be under government control. *Id.* Since Hynix's creditors generally acted like Citibank during the restructuring, Hynix argues that a government subsidy function simply could not have been performed. *Id.* Commerce's conclusion to the contrary was, in Hynix's view, not in accordance with law and unsupported by substantial evidence. *Id.*

The Court upholds both Commerce's interpretation and application of the portion of 19 U.S.C. § 1677(5)(B)(iii) pertaining to the performance of a government subsidy function. First, under two-step *Chevron* analysis, Commerce's interpretation of the relevant statutory language is in accordance with law. 19 U.S.C. § 1677(5)(B)(iii)

provides that, to be actionable, the provision of a financial contribution must be done by a function or practice normally vested in or followed by government; however, the statute does not define or provide examples of such functions or practices. The relevant legislative history is likewise silent. In light of this statutory ambiguity, Commerce is given deference under *Chevron* step one to make a reasonable interpretation. *See Floral Trade Council v. United States*, 23 CIT 20, 24, 41 F. Supp. 2d 319, 324 (1999) (noting that courts will defer to Commerce's reasonable interpretation under *Chevron* where Congress's intended definition of a term is not ascertainable through statutory construction).

Turning to *Chevron* step two, Commerce determined that this portion of 19 U.S.C. § 1677(5)(B)(iii) was best understood as making actionable under the countervailing duty law only those financial contributions which could be characterized as fulfilling a "governmental subsidy function[.]" Decision Memo at 47. In the Court's view, an example best demonstrates the soundness of this interpretation: in the context of an ordinary civil trial, a government, through its courts, could order a losing party to pay the prevailing party punitive damages. Such a court order would direct a private entity to transfer funds to another private entity without any consideration, resulting in a windfall to the second party. This order would contain the familiar elements of government direction, financial contribution, and benefit – but should such an order reasonably be considered a countervailable subsidy? 19 U.S.C. § 1677(5)(B)(iii), as interpreted by Commerce, clearly provides the answer: no, because under normal circumstances court-ordered punitive damages do not fulfill a government subsidy function.[17] Commerce's interpretation of 19 U.S.C. § 1677(5)(B)(iii) avoids the nonsensical result of bringing many more government actions within the ambit of the countervailing duty law than could have been plausibly intended by Congress.

Further, the Court is not persuaded by Hynix's criticism of Commerce's interpretation. In essence, Hynix argues for a more limited reading of the government subsidy function requirement of 19 U.S.C. § 1677(5)(B)(iii) – namely that a government subsidy function cannot be performed if the practice in question is commercially rational. What Hynix fails to recognize is that the countervailing duty statute already requires Commerce to consider the relative commerciality of a financial contribution – to determine if a *benefit* has been conferred. *See* 19 U.S.C. § 1677(5)(B)(iii) (1999); *id.* § 1677(5)(E). Hynix's interpretation seeks to unnecessarily conflate

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[17] Rather, court-ordered punitive damages are generally considered to implicate a government's police power. *See United States v. Morrison*, 529 U.S. 598 (2000) (characterizing use of punitive damages to suppress crime as example of state police power).

two statutorily distinct inquiries and is therefore unpersuasive. As such, the Court finds Commerce's reasonable statutory interpretation of the portion of 19 U.S.C. § 1677(5)(B)(iii) pertaining to the government subsidy function requirement to be in accordance with law.

In addition, the Court finds substantial evidence in support of Commerce's conclusion that the government subsidy function requirement was satisfied by the investigated financial contributions.[18] As discussed above at Part III.B, Hynix's creditors transferred funds, in the form of preferential loans and equity infusions, pursuant to the entrustment or direction of the Korean government. If the Korean government had undertaken these transfers directly, there can be no question that it would have thereby provided countervailable subsidies to Hynix. *See* 19 U.S.C. § 1677(5)(B)(i) (1999) (describing countervailable subsidy to include benefit-conferring financial contribution provided directly by a government). In effect, the Korean government delegated its subsidy function to Hynix's creditors, which then performed officially sanctioned "financial support activities[.]" Decision Memo at 61. As such, substantial evidence supports the conclusion that the government subsidy function requirement of 19 U.S.C. § 1677(5)(B)(iii) was met.

Accordingly, the Court upholds Commerce's conclusion that Hynix's creditors performed a government subsidy function for purposes of 19 U.S.C. § 1677(5)(B)(iii) as in accordance with law and supported by substantial evidence.

D. Commerce's Benefit Analysis Is In Accordance with Law and Supported by Substantial Evidence

Turning to the final prong of 19 U.S.C. § 1677(5)(B)(iii), Hynix alleges error with the two principal analyses underlying Commerce's conclusion that a countervailable benefit was conferred to Hynix during its restructuring. First, Hynix claims that Commerce's creditworthiness analysis, which determined that Hynix would not have been able to attract loans from commercial sources during its restructuring, was flawed. Pls.' Br. at 36–40, 42–45, 49–50. Second, Hynix argues that Commerce's equityworthiness analysis, which determined that Hynix would not have been able to attract equity from commercial sources during its restructuring, was also flawed. *Id.* at 40–42, 46–49. Hynix's specific arguments concerning Commerce's

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[18] Hynix asserts that Commerce "completely ignored the second independent prong of 19 U.S.C. § 1677(5)(B)(iii)" (*i.e.*, the government subsidy function requirement) in reaching its determination. Pls.' Br. at 33. The Court disagrees with this characterization. While Commerce's analysis certainly could have been more rigorously demarcated, the Court must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

creditworthiness analysis and equityworthiness analysis are addressed separately below.[19]

For the reasons that follow, the Court upholds Commerce's conclusion that a benefit was conferred to Hynix by its receipt of government-entrusted or directed financial contributions as in accordance with law and supported by substantial evidence.

1. Creditworthiness Analysis

a. Commerce's Rejection of Loans Made by Citibank as Commercial Benchmarks in Hynix's Creditworthiness Analysis Is Reasonable

Hynix contends that Commerce erroneously rejected as commercial benchmarks the loans made by Citibank to Hynix during its restructuring, ultimately leading to an inaccurate creditworthiness analysis. Pls.' Br. at 36. Hynix argues that Commerce should have considered these loans, made by a concededly independent commercial actor, as evidence that Hynix was creditworthy. *Id.* at 37. In support of this position, Hynix points to the countervailing duty regulations, which state that "the receipt [by an investigated company] of comparable long-term commercial loans, unaccompanied by a government-guarantee, will normally constitute dispositive evidence that [the investigated company] is not uncreditworthy." *Id.* at 35 (*quoting* 19 C.F.R. § 351.505(a)(4)(ii) (2005)). Hynix also contends that Commerce ignored affidavits by Citibank officials indicating that the bank's involvement in Hynix's restructuring stemmed from purely commercial motivations, rather than the influence of the Korean government. *Id.* at 42–44. Finally, Hynix argues that Citibank's dual role as lender and financial advisor to Hynix should not have led Commerce to the conclusion that Citibank was different from the average lender. *Id.* at 44–45.

The Court finds that Commerce reasonably determined that the loans made by Citibank were not suitable commercial benchmarks for use in Hynix's creditworthiness analysis. First, Commerce acted in accordance with law when it considered the influence of governmental actions on a private entity whose loans were proffered as commercial benchmarks of creditworthiness for an investigated company. The preamble to the countervailing duty regulations explains that Commerce will carefully examine any loan made by a private entity which is part of a package including government loans to determine if the loan is truly "commercial" in nature. *Countervailing*

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[19] Concerning both of these analyses, Hynix argues that Commerce erred by refusing to use as commercial benchmarks the loans and equity infusions made by Hynix's creditors (other than Citibank) during Hynix's restructuring. Pls.' Br. at 45–46. Because the Court concludes that Commerce reasonably found these loans and equity infusions to have been made pursuant to government-entrustment or direction, *see supra* Part III.B, the Court also upholds Commerce's decision to disqualify them as commercial benchmarks.

Duties, 63 Fed. Reg. 65348, 65364 (Dep't Commerce Nov. 25, 1998) (final rule). This examination is necessary because, as Commerce has noted, "special features" in such a loan package may influence an otherwise independent, commercial lender to "offer lower, more favorable terms than would be offered absent the government/commercial bank package." *Id.* For purposes of this examination, Commerce need not find that a private entity has been entrusted or directed by a government for that entity to nonetheless be influenced by the government's actions when making investment decisions. For example, it would be fully rational for an independent private entity seeking to make sound business decisions based on market factors to take into consideration a government's pervasive involvement in the restructuring of a company. Although rightly a factor in the commercial decision-making process, such government influence would render that entity's loans inappropriate for use as commercial benchmarks in creditworthiness analysis.[20]

Further, Commerce's finding that Citibank's lending decisions were influenced by the Korean government's involvement in Hynix's restructuring is supported by substantial evidence. Commerce appropriately took great care in examining the nature of Citibank's lending to Hynix during a restructuring which involved significant participation by government-entrusted and directed financial institutions. Commerce found that Citibank waited until the involvement of these financial institutions was assured before it committed resources to Hynix's restructuring. Decision Memo at 9–10; *see also* Def.'s App., App. 8 (Hynix Verification Report dated May 15, 2003) at 20 ("Citibank decided to participate in the [bond] issuance that was part of the May restructuring to provide a 'symbolic gesture of support' to show that Citibank willing [sic] to stand behind Hynix."); *id.* at 21 ("Citibank felt that it was best to provide a small additional amount of funding and 'ride' with the [Korean] banks to see if Hynix could make it as an ongoing concern. The officials explained that Citibank was making a bet that the [Korean] banks would protect their exposure."). Only then did Citibank seek internal credit approval for its portion of the first loan to Hynix. Def.'s App., App. 8 (Hynix Verification Report, dated May 15, 2003) at 20 ("According to Citibank officials, it did not seek internal credit approval for its por-

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[20] Consideration of the distortive, if non-countervailable, role a government may play in the marketplace is not limited to this section of the countervailing duty statute. For example, with regard to the privatization of government-owned companies, the presumption of subsidy extinguishment which accompanies the sale of such a company for fair market value "may be rebutted upon a showing that the sale process was distorted through government intervention" in the broader market. *Allegheny Ludlum Corp. v. United States*, 29 CIT ____, ____, 358 F. Supp. 2d 1334, 1346 (2005) (*citing Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37125, 37127 (Dep't Commerce June 23, 2003) (notice of modification of agency practice regarding privatizations)).

tion of the syndicated bank loan until after the [Korean] banks committed to the syndicated bank loan."). In addition, the level of Citibank's lending to Hynix – only 12.5 percent of the December 2000 syndicated loan and a small percentage of the May 2001 restructuring package – further supports Commerce's conclusion that Citibank was able to alter its lending risk calculus by relying on the dominant participation of government-entrusted or directed financial institutions.[21] *See* Def.'s App., App. 7 (Commerce Mem. on Bus. Proprietary Info. for Final Determination dated June 16, 2003) at Attach. 1 (detailing Citibank's share of new debt extended to Hynix); *id.*, App. 24 (Hynix Supplemental Resp. dated Mar. 4, 2003) at Ex. 8 (detailing Hynix's various loans). Based on this evidence, it was reasonable for Commerce to conclude that the involvement of government-entrusted or directed financial institutions affected the terms by which Citibank agreed to lend to Hynix. Hynix counters that Commerce failed to take into consideration two affidavits by Citibank officials which indicated that Citibank acted in a purely commercial manner independent of government influence. Pls.' Br. at 42–44; *see* Pls.' App., App. 17 (Citibank Aff. dated Mar. 20, 2003); *id.*, App. 18 (Citibank Aff. dated May 22, 2003). However, Commerce specifically addressed these affidavits in its Decision Memo and in fact altered certain aspects of its preliminary analysis as a result of this evidence. *See* Decision Memo at 8 ("Since our preliminary analysis, relevant evidence has been added to the record which warrants a reconsideration. . . . This includes information provided by Citibank officials in an interview at verification, which Citibank further clarified in a second affidavit. . . ."). Commerce nonetheless concluded that these affidavits supported its finding that Citibank considered factors, like the participation of government-entrusted or directed financial institutions,[22] when lending to Hynix. Upon a careful review

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[21] Indeed, as indicated in the preamble to the countervailing duty regulations, the "relatively small amount" of a long-term commercial loan may rebut the presumption of creditworthiness which accompanies its receipt by a company. *Countervailing Duties*, 63 Fed. Reg. 65348, 65367. Accordingly, Commerce's substantiated finding that Citibank's lending was "relatively small in absolute and percentage terms compared to the involvement" of the government-entrusted or directed financial institutions during Hynix's restructuring, Decision Memo at 9, provides independent justification for Commerce's rejection of Citibank's loans as commercial benchmarks. Hynix's attempt to undermine this finding by comparing Citibank's lending with that of individual government-entrusted or directed financial institutions (rather than the group as a whole), *see* Pls.' Br. at 38–40, is unavailing.

[22] In addition, Commerce reasonably found that Citibank likely took into consideration its dual role (through SSB) as Hynix's financial advisor when making lending decisions. As Commerce noted in the preamble to the countervailing duty regulations, "many characteristics could factor into a decision of whether a loan should be considered comparable to the government-provided loan." *Countervailing Duties*, 63 Fed. Reg. 65348, 65363. One such characteristic could be the existence of an alternative revenue stream which directly affects the relative risk of entering into a commercial relationship. As a result, even if Commerce had found Citibank's loans to be otherwise suitable commercial benchmarks, the agency still would have been justified in taking this aspect of Citibank's loans into consideration.

of these largely confidential affidavits as urged by Hynix, the Court cannot disagree with this conclusion.

As such, the Court concludes that Commerce's rejection of Citibank's loans as commercial benchmarks in Hynix's creditworthiness analysis is reasonable.

b. Commerce's Rejection of the Korean Default Rates Supplied by Hynix Is Reasonable

Hynix next contends that, once Commerce erroneously determined that Hynix was uncreditworthy, Commerce further erred by using Moody's U.S. average cumulative default rates to construct an uncreditworthy benchmark for use in calculating the benefit received by Hynix from government-entrusted or directed loans. Pls.' Br. at 49. Hynix argues that Commerce should have instead used Korean default rates for corporate bonds published by Korean bond rating agencies and provided to Commerce by Hynix. *Id.* at 49. Hynix argues that, while Commerce's regulations generally require the agency to use Moody's U.S. data, they also allow Commerce to consider country-specific data when available. *Id.* (*citing Countervailing Duties*, 63 Fed. Reg. 65348, 65365). Hynix contends that Commerce should have recognized that the available Korean default data was much more accurate than Moody's U.S. default data for this investigation. *Id.* Further, Hynix argues that Commerce inappropriately rejected the Korean default data simply because it was "not sufficiently clear" that the data was comparable to Moody's U.S. data. *Id.* (*quoting* Decision Memo at 105). Hynix argues that Commerce was legally required to seek the needed clarification from Hynix before drawing such an unjustified, adverse inference about the data. Pls.' Br. at 49 (*citing Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 24 F. Supp. 2d 304 (1998) (holding that Commerce must provide opportunity for clarification/correction before drawing adverse inferences)).

The Court finds that Commerce reasonably rejected the Korean default data provided by Hynix for calculating the uncreditworthy benchmark. First, Commerce appropriately found the data provided by Hynix to be unclear and incomplete. The countervailing duty regulations state that Commerce normally uses the average "cumulative" default rates developed by Moody's to construct uncreditworthy benchmarks. 19 C.F.R. § 351.505(a)(3)(iii) (2005). The preamble to Commerce's countervailing duty regulations reiterates this requirement and makes clear that Commerce will only consider using non-Moody's data that is "detailed and comprehensive[.]" *Countervailing Duties*, 63 Fed. Reg. 65348, 65365. Notwithstanding this, Hynix provided default data without any indication that it was cumulative. Decision Memo at 105. Further, the minimal data of-

fered by Hynix provided none of the detail or discussion of methodology which would have allowed Commerce to compare the quality of that data to Moody's U.S. data. *Id.* Instead, a portion of the Korean default data was anomalous *on its face*. *See* Pls.' App., App. 10 (Supplemental Questionnaire Resp. of Hynix dated Mar. 4, 2003) at Ex. 18 (report of one Korean bond rating agency indicating a default rate of 2.47 percent for "CCC and below" bonds and a default rate of 4.98 percent for "A" bonds). Hynix did not provide any explanation for these aberrational default rates with its submission. Given these omissions, Commerce had reasonable grounds to question the reliability of the Korean default data provided by Hynix and ultimately disregard it.

Second, Commerce did not err by declining to request clarification of the Korean default data from Hynix. Commerce was not required by the countervailing duty statute or regulations to offer Hynix an opportunity to better explain or correct its proffered data. Rather, the countervailing duty regulations place the onus on the parties to an investigation to convince Commerce that more accurate, country-specific default information is available.[23] To that end, Plaintiffs' reliance on *Helmerich* is misplaced. *Helmerich* stands for the principle that Commerce must "fairly request" information from a party before drawing an "adverse inference" that the party has failed to cooperate. *Helmerich*, 22 CIT at 931, 24 F. Supp. 2d at 308. This principle is not applicable to Commerce's rejection of the Korean default data because Commerce did not apply adverse inferences. Rather, Commerce's *standard* methodology is to use Moody's U.S. default data. This court has held that Commerce does not make an adverse inference by "simply following its standard practice[.]" *Rhodia, Inc. v. United States*, 26 CIT 1107, 1111, 240 F. Supp. 2d 1247, 1251 (2002).

As such, the Court concludes that Commerce's rejection of the Korean default rates for purposes of Hynix's creditworthiness analysis is reasonable.

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[23] *Compare Countervailing Duties*, 63 Fed. Reg. 65348, 65365 ("[I]f [detailed and comprehensive country-specific default data] do exist and are *brought to our attention* in the course of an investigation . . . we would consider using the default rate from the country under investigation.") (emphasis added) *with* 19 U.S.C. § 1677m(d) (1999) (if "a *response to a request for information* under this title does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency") (emphasis added). Absent an affirmative due process, statutory, or regulatory obligation on the part of Commerce to request clarification of unsolicited default data, the Court will not here impose one. However, the Court notes that Commerce's selection of default data must nonetheless be adequately explained and supported by substantial evidence, thereby potentially limiting Commerce's discretion in future investigations involving country-specific default data which does not feature the serious infirmities present here.

2. *Equityworthiness Analysis*

a. *Commerce's Rejection of Equity Investments Made by Citibank as Commercial Benchmarks in Hynix's Equityworthiness Analysis Is Reasonable*

Hynix next argues that Commerce erred in finding Citibank's equity investment in Hynix to be too small for use as a commercial benchmark of the price of Hynix's equity, ultimately resulting in a flawed equityworthiness analysis. Pls.' Br. at 40. Hynix notes that, following the October 2001 debt-to-equity conversion, Citibank became Hynix's fifth largest shareholder.[24] *Id.* Hynix contends that Citibank's investment, representing only a small percentage of the total debt-to-equity conversion but valued at tens of millions of dollars, should have been considered "significant" and thus qualified for use as a commercial benchmark. *Id.* at 41 (*citing* 19 C.F.R. § 351.507(a)(2)(iii) (2005)). Hynix argues that Commerce should have reached this conclusion in order to be consistent with its past determinations. *Id.* (*citing Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 31992 (Dep't Commerce June 19, 1995) (final determination) (finding investment valued at approximately $15 million and resulting in 18.3 percent ownership interest in an investigated company to be significant) (***"Seamless Pipe from Italy"***)). Hynix argues that an appropriate comparison of Citibank's investment in Hynix and that in *Seamless Pipe from Italy* should have compared the amount of the investment and not the percent ownership interest involved. Pls.' Br. at 41. According to Hynix's calculations, had Commerce compared the amounts invested in the two investigated companies, Commerce would have found that the value of Citibank's investment was far greater than the investment at issue in *Seamless Pipe from Italy*, which Commerce had determined to be significant under 19 C.F.R. § 351.507(a)(2)(iii). *Id.*

The Court concludes that Commerce appropriately found the equity investment made by Citibank was not a suitable commercial benchmark for use in Hynix's equityworthiness analysis. First, Commerce's interpretation of the significant investment requirement of 19 C.F.R. § 351.507(a)(2)(iii) is reasonable. Commerce included the significant investment standard in its regulations based on the observation that "the volume of a firm's traded shares [may] be so low as to preclude the use of those shares as a benchmark." *Countervailing Duties*, 62 Fed. Reg. 8818, 8832 (Dep't Commerce Feb. 26, 1997) (notice of proposed rulemaking and request for public comments). However, neither this language nor the text of the regulation makes

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[24] The actual portion of Citibank's equity purchase which occurred during Hynix's restructuring is confidential.

clear how the significance of an investment should be evaluated by Commerce. Commerce argues that it should, and here as in *Seamless Pipe from Italy* properly did, focus its inquiry on the percent involvement by private investors - rather than the dollar value of private investment. The Court agrees. In this case as well as *Seamless Pipe from Italy*, Commerce largely rested its significance determination on the percent interest held by private investors, even though the dollar amount of private investment could be roughly deduced from the facts presented. *See* Decision Memo at 90; *Seamless Pipe from Italy*, 60 Fed. Reg. at 31994. While this construction of the term "significant" is not necessarily compelled by the language of Commerce's regulation, it is far from being at odds with the regulation. Analysis of percent interest appears to provide a controlled and predictable way for Commerce to evaluate the significance of equity investments across different industries and investigations. Comparisons of dollar amounts across investigations, as suggested by Hynix, would require Commerce to control for the effects of inflation, exchange rate fluctuations, and, most challenging, the variability in the intrinsic value of companies in order to apply the regulation in an evenhanded manner. The difficulties inherent in Hynix's approach demonstrate the reasonableness of Commerce's construction of its own regulation, already entitled to significant deference under this Court's standard of review.

Second, applying Commerce's construction of 19 C.F.R. § 351.507(a)(2)(iii) to this case, substantial evidence supports the finding that Citibank's equity stake in Hynix was not significant. Citibank's equity purchase during Hynix's restructuring was well below the 18.3 percent equity stake found to be significant in *Seamless Pipe from Italy*. Although the exact "significant" threshold is not clear from Commerce's construction, it was reasonable for Commerce to conclude that an investment the size of Citibank's was not significant.

As such, Commerce's rejection of Citibank as a commercial benchmark in Hynix's equityworthiness analysis is reasonable.

b. Commerce's Use of the Expected Utility Model to Reject the October 2001 Debt-to-Equity Conversion as Evidence of Hynix's Equityworthiness Is Reasonable

Hynix next contends that, despite the absence of commercial benchmarks, Commerce erroneously disregarded the October 2001 debt-to-equity conversion as evidence that Hynix was otherwise equityworthy. Pls.' Br. at 48. In rejecting this transaction, Hynix argues that Commerce impermissibly grafted an economic theory – the Expected Utility Model – into the countervailing duty statute and regulations. *Id.* Contrary to this model, which states that the existence and status of previous investments in a company are extraneous considerations when weighing new investment in the same com-

pany, Hynix argues that it is natural for an existing creditor to consider the likely effect of a new investment on an existing investment in the same company. *Id.* According to Hynix, an investor already deeply committed to a company might make an additional capital infusion in the hopes that more resources will help the company to improve. *Id.* If Commerce had instead applied this principle, Hynix argues that it would have found the October 2001 debt-to-equity conversion to be consistent with the "usual investment practice" of at least some "private investors" – the standard by which Commerce must evaluate the benefit conferred by an equity infusion. *Id.* (*citing* 19 U.S.C. § 1677(5)(E)(i) (1999)).

The Court finds that Commerce's rejection of the October 2001 debt-to-equity conversion as evidence of Hynix's equityworthiness is reasonable. First, Commerce's use of the Expected Utility Model is in accordance with law. Commerce has repeatedly used the Expected Utility Model as a methodological tool to help analyze the equityworthiness of investigated companies. *See, e.g.*, *Certain Steel Products from Austria*, 58 Fed. Reg. 37217, 37249–50 (Dep't Commerce July 9, 1993) (final determination); *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 58 Fed. Reg. 6237, 6245 (Dep't Commerce Jan. 27, 1993) (final determination); *Steel Wheels from Brazil*, 54 Fed. Reg. 15523, 15530 (Dep't Commerce Apr. 18, 1989) (final determination). Although not identifying the model by name, this court has upheld the logical underpinnings of this methodology in past reviews of Commerce's countervailing duty determinations. *See British Steel Corp. v. United States*, 10 CIT 224, 231, 632 F. Supp. 59, 65 (1986); *Companhia Siderurgica Paulista, S.A. v. United States*, 12 CIT 1098, 1101–03, 700 F. Supp. 38, 42–43 (1988). In *British Steel*, an analogous case involving a previous version of the countervailing duty statute, the court reviewed Commerce's finding that the British government's equity investments in the investigated company were inconsistent with commercial considerations. *British Steel*, 10 CIT at 224–25, 632 F. Supp. at 60. British Steel argued that such equity investments should be considered commercially reasonable where the funds are used to help cover the operating losses of an investigated company which is able to cover its variable costs; the additional equity would be used to pay down fixed costs. *Id.* at 228–29, 632 F. Supp. at 62–63. British Steel maintained that it would be economically rational for an investor to support continued operations by such a company so that the company's overall loss would be minimized by the additional investment funds. *Id.* This court upheld Commerce's rejection of British Steel's arguments, stating:

> [I]t would be unrealistic to expect a private sector investor to supply operating funds to a loss-incurring firm merely to permit the firm to continue operations to minimize its losses. Thus, while it may be perfectly rational for an owner to sustain

> loss-minimizing operations, it would not be commercially reasonable for an investor to provide funds for that purpose without adequate assurance of the future profitability of the enterprise and a return on . . . investment within a reasonable time.

Id. at 231, 632 F. Supp. at 65. The poor financial prospects of the investigated company, based on a trend of consistently bad returns, were critical to this court's implicit support of the Expected Utility Model used by Commerce in *British Steel*. *See also Companhia Siderurgica Paulista*, 12 CIT at 1103, 700 F. Supp. at 43 (approving of Commerce's "comprehensive analysis" which focused on company's current health, past performance, independent studies, and industry forecasts).

Like *British Steel*, substantial evidence in this case demonstrates that Hynix was a company whose consistently bleak financial results could provide a reasonable investor with little assurance of future profitability. *See* Decision Memo at 92; Def.'s App., App. 4 (Creditworthiness Analysis of Hynix Semiconductor, Inc. dated Mar. 31, 2003) at 3–5 (analyzing Hynix's financial records from 1997 to 2002). Hynix's arguments against application of the Expected Utility Model would perhaps warrant greater consideration in a case where investors in a generally sound company faced only short-term financial troubles. *See British Steel*, 10 CIT at 231, 632 F. Supp. at 65 (noting that "equity infusions in loss-incurring companies do not *per se* confer a subsidy"). Such is not the case here. Under these circumstances, application of the Expected Utility Model as a methodological tool for assessing equityworthiness is reasonable. Commerce therefore properly found that the purchase of an additional equity stake in Hynix in October 2001 was inconsistent with the usual investment practice of private investors.

As such, Commerce's rejection of the October 2001 debt-to-equity conversion as a commercial benchmark for use in Hynix's equityworthy analysis is reasonable.

c. Commerce's Rejection of Third Party Studies Commissioned by Hynix's Creditors During the Restructuring as Evidence of Hynix's Equityworthiness Is Reasonable

Finally, Hynix contends that Commerce improperly rejected studies by third parties which discussed the financial merits of investment in Hynix and proved that Hynix was otherwise equityworthy during its restructuring. Pls.' Br. at 47. Hynix argues that these studies, relied upon by Hynix's creditors in making their investment decisions, provided important insight into the perceived commercial rationality of transactions like the October 2001 debt-to-equity conversion. *Id.* at 46–47. Hynix argues that Commerce should not have disregarded these studies simply because they focused on investment in Hynix from a creditor (rather than new investor) perspec-

tive. *Id.* at 47 (*citing* Decision Memo at 91 (noting that studies focused on "financial mechanisms available to save Hynix from collapse")).

The Court upholds Commerce's rejection of the third party studies commissioned by Hynix's creditors as evidence of Hynix's equityworthiness. Hynix advances these studies as its principal evidence of why an already committed investor would continue to finance the struggling Hynix in order to minimize losses. To the extent that this argument largely relies on acceptance of Hynix's criticism of the Expected Utility Model, it is rejected by the Court. *See supra* Part III.D.2.b. In addition, the Court notes that Commerce questioned the credibility and/or reliability of several of these studies for reasons related to soundness of methodology and independence of analysis. *See* Decision Memo at 91–92. This finding, uncontested here by Hynix, provides an alternative ground for rejecting these studies because they were not "[o]bjective analyses" as required by the countervailing duty regulations. 19 C.F.R. § 351.507(a)(4)(i)(A) (2005).

As such, Commerce's rejection of the third party studies for use in Hynix's equityworthy analysis is reasonable and, accordingly, the Court upholds as in accordance with law and supported by substantial evidence Commerce's conclusion that the government-entrusted or directed financial contributions received by Hynix during its restructuring conferred a countervailable benefit.

IV. *CONCLUSION*

For the foregoing reasons, the Court sustains the *Remand Results* and the remainder of the previously deferred *Final Determination.* Judgment shall be entered accordingly.

Slip Op. 06 – 40

AGRO DUTCH INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR MUSHROOM TRADE, Defendant-Intervenor.

Before: MUSGRAVE, Judge
Court No. 04–00493

[On challenge by producer/exporter to antidumping duty administrative review margin determination by U.S. Department of Commerce, matter remanded for reconsideration.]

Dated: March 28, 2006

Garvey Schubert Barer (*Lizbeth R. Levinson, Ronald M. Wisla*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Richard Schroeder*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Matthew D. Walden*), of counsel, for the defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey, Adam H. Gordon*), for the defendant-intervenor.

OPINION

The plaintiff Agro Dutch Industries, Ltd. brings this action to contest *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 51630 (Aug. 20, 2004), *as amended* 69 Fed. Reg. 55405 (Sep. 14, 2004), the fourth administrative review since publication of the underlying antidumping duty order. *See* Pub R. 140 (unpublished), 153. Agro Dutch challenges three aspects of the determination, conducted by the U.S. Department of Commerce, International Trade Administration ("Commerce" or the "Department"): (1) the decision to treat the cost of merchandise returns to India as an indirect selling expense incurred on U.S. sales, (2) the weighted average of home market selling expenses of other respondents used as a surrogate for Agro Dutch's, which Agro Dutch contends incorporated the incorrect conclusion that commission payments from respondent Weikfield to its affiliate seller in the home market had not been at arm's length (which were thus treated not as deductible direct selling expenses but as indirect selling expenses), and (3) a finding of antidumping duty absorption. The defendant United States and the defendant-intervenor Coalition for Fair Mushroom Trade ("CFMT") oppose Agro Dutch's USCIT Rule 56.2 motion, arguing that Commerce's determination should be sustained as is. For the following reasons, the matter will be remanded to Commerce for reconsideration.

Jurisdiction; Standard of Review

The Court has jurisdiction over the matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). A final determination for an antidumping duty administrative review is to be upheld unless it is unsupported by substantial evidence or is otherwise not in accordance with law. See 19 U.S.C. § 1516a(b)(1)(B)(i).

Background

Plaintiff Agro Dutch Industries, Ltd. is a producer or exporter of India of certain preserved *Agaricus bisporus* and *Agaricus bitorquis* mushrooms subject to *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms From India*, 64 Fed. Reg. 8311 (Feb. 19,

1999). The contested administrative review covers the period February 1, 2002 through January 31, 2003 ("POR") and resulted in a 34.57% antidumping margin against Agro Dutch. The margin of dumping thereat is the excess of normal value (the price at which the merchandise or foreign like product is sold in the foreign home market in the ordinary course of trade) over export price (the price at which the producer or exporter sells to an unaffiliated purchaser in the U.S. market) or, as appropriate, constructed export price (the price at which an affiliate of the producer or exporter sells to an unaffiliated purchaser in the U.S. market). *See generally* 19 U.S.C. §§ 1675(a)(1)(B), 1675(a)(2)(A), 1677(35)(A), 1677a(a), 1677b(a)(1)(B)&(C), 1677b(a)(4).

Discussion

I. *Movement Expense of Canceled Sales*

Commerce determined at the preliminary review that during the POR Agro Dutch had sold merchandise directly to one or more unaffiliated purchasers in the U.S. prior to importation on an FOB, C&F or CIF basis and acted as the importer of record. Because the circumstances of the U.S. sales did not otherwise indicate that a constructed export price methodology was appropriate, Commerce determined that reliance upon export price was appropriate. *Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 10659, 10662 (Mar. 8, 2004), Pub. R. 113. *See* 19 U.S.C. §§ 1677(35)(A), 1677a(a). From the starting price, Commerce deducted foreign inland freight, freight document charges, transportation insurance, foreign brokerage and handling, Indian export duty, and international freight, and made certain other adjustments, as required by statute. 69 Fed. Reg. at 10662. *See* 19 U.S.C. § 1677a(c)(2); 19 C.F.R. § 351.402.

Due to insufficient Agro Dutch sales in the home market, at the preliminary review Commerce based normal value on Agro Dutch's sales to Israel, except for certain non-contemporaneous sales to the U.S. and Israel for which Commerce used constructed value (the sum of materials and fabrication, plus an amount for indirect costs such as selling, general and administrative (SGA), plus an amount for profit, plus whatever costs would be incurred to place the merchandise into *ex factory* condition, packed and ready for shipment to the United States). 69 Fed. Reg. at 10662. *See* 19 U.S.C. § 1677b(e). Commerce also excluded certain sales below the cost of production to Israel from Agro Dutch from the determination of normal value. 69 Fed. Reg. at 10664. *See* 19 U.S.C. § 1677b(b)(1). Commerce also determined that the comparisons of export price and normal value were at the same level of trade ("LOT") and therefore no LOT adjustment was necessary. 69 Fed. Reg. at 10662. *See* 19 U.S.C. § 1677b(a)(1)(B)(i).

Certain Agro Dutch shipments deemed pertinent to the POR were discovered upon arrival in the United States to have minute traces of contaminates exceeding a U.S. Food and Drug Administration zero tolerance specification. Accordingly, Agro Dutch canceled the sales, recalled the merchandise, and the merchandise thus never entered into U.S. commerce. According to the record, Agro Dutch undertook recall, rather than destruction, on the expectation that it could reprocess the merchandise for resale to customers in other countries, and a majority were, in fact, sold to customers in other countries during the POR. *Cf.*, *e.g.*, Conf. R. 50, Attachment 2 (total quantity resold). Commerce preliminarily concluded that notwithstanding the cancellation of sales, the movement of the merchandise to the United States was nonetheless "associated with U.S. sales" and therefore the expense of moving the merchandise to the U.S. was properly regarded as an indirect selling expense associated with U.S. sales; thus for the preliminary results, Commerce included the entire cost of moving the recalled merchandise from the U.S. to India as an indirect selling expense associated with U.S. sales but allowed a deduction for resales of the recalled merchandise to third-country customers. 69 Fed. Reg. at 10664.

The final results used the same methodology as the preliminary results except that Commerce revised its position and included all expenses related to the movement of the recalled merchandise from the U.S. to India, regardless of resale to other markets during the POR. Commerce explained that the assignment of "all such expenses to the market of the originating sale" is consistent with *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia*, 69 Fed. Reg. 20592 (April 16, 2004) (*see* issues and decision memorandum, comment 2), that "Agro Dutch did not ship the recalled sales directly to third-country customers, but rather returned them to India to replace the merchandise in its inventory[,]" and that since "the expense is associated with selling to the United States and the original place of shipment for sales in other markets does not become the United States, we cannot assign the movement expense for the return of the goods to the third-country resales." *Issues and Decision Memorandum for Final Results of the Antidumping Duty Administrative Review on Certain Preserved Mushrooms from India* ("*I&D Memo*"), Pub. R. 141, at 4–5.

None of the parties contests the India-to-U.S. movement as indirect selling expense associated with U.S. sales: the complaint is that the U.S.-to-India movement was also treated as "indirect selling expenses associated with U.S. sales." Agro Dutch argues that this finding is unsupported by substantial evidence on the record. It emphasizes that the reason for returning the merchandise to India, with which Commerce agreed, was to reprocess the merchandise for resale to other markets in other countries. The majority were, in fact,

sold to countries other than Israel during the POR, and Agro Dutch therefore argues that the cost of moving the recalled merchandise from the U.S. to India is tied directly to the subsequent sales and is properly chargeable to such foreign market sales.

The government defends on the ground that "the associated expenses never lost their character of relating to United States sales" and therefore Commerce properly included these expenses as U.S. indirect selling expenses. Def.'s Br. at 8–11. CFMT, the petitioner at the administrative proceeding, argues that Commerce's methodology recognizes all attributes of the failed U.S. sales as U.S. expenses until such time as the goods have returned to their place of origin. Def-Int's Br. at 5–8.

As an initial observation, the Court notes that Commerce has defined "direct selling expenses" in the context of the differences in circumstances of sale regulation. They are "expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). By contrast, Commerce defines "indirect selling expenses" in the context of the constructed export price offset regulation, to wit: "selling expenses, other than direct selling expenses or assumed selling expenses (*see* [19 C.F.R.] § 351.410), that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales." 19 C.F.R. § 351.412(f)(2). More generally, with amendment of U.S. law by passage of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"), Commerce described indirect selling expenses as

> expenses which do not meet the criteria of "resulting from and bearing a direct relationship to" the sale of the subject merchandise, do not qualify as assumptions, and are not commissions. Such expenses would be incurred by the seller regardless of whether the particular sales in question are made, *but reasonably may be attributed (at least in part) to such sales.*

H.R. Rep. No. 103–316, at 824 (Dec. 8, 1994) (Statement of Administrative Action ("SAA")),[1] *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4164 (italics added). The courts have further observed that indirect selling expenses are considered those "sales-related" expenses that do not vary with the quantity sold or are not related to a particular sale. *E.g. SKF USA Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d

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[1] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

1370, 1374 n.7 (Fed. Cir. 1999) (citations omitted). They are, quite simply, a part of the cost of doing business.

In this matter, substantial evidence supports Commerce's conclusion that the movement costs, both to and from the U.S., did not encompass direct selling expenses related to U.S. sales. The underlying U.S. sales to which they related were canceled and excluded from the dumping analysis. But that is not to imply that the movement costs *therefore* encompassed indirect selling expenses that may "reasonably be attributed (at least in part)" to the U.S. sales or that it is appropriate to include such in the dumping analysis. In the determination of export price, in addition to the other modifications of the starting price, the only provision of apparent relevance to the immediate issue is 19 U.S.C. § 1677a(c)(2)(A), which requires deduction of the expenses "which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States[.]" 19 U.S.C. § 1677a(c)(2)(A). However, those expenses encompass movement expenses, not U.S. indirect selling expenses. *See NSK Ltd v. United States*, 390 F.3d 1352 (Fed. Cir. 2004) (selling expenses are not movement expenses). *Cf.* 19 U.S.C. § 1677a(d)(1)(D) (allowing for deduction of "other" selling expenses from constructed export price). In any event, the recalled merchandise was not "subject merchandise . . . *in* the United States" because it never entered the commerce of the United States.

Considering the baseline variable of the dumping equation, the calculation of normal value presents a similar conundrum to the inclusion of U.S. indirect selling expenses in the margin calculation for this matter. No relevant part of subsection (a) or (e) of 19 U.S.C. § 1677b appears to permit an adjustment to normal or constructed value for indirect selling expenses associated with U.S. selling. The selling, general and administrative expenses component of constructed value focuses on those SG&A expenses undertaken in connection with the production and sale of a "foreign like product" "in the ordinary course of trade" "for consumption in the foreign country," plus profit. *See* 19 U.S.C. § 1677b(e)(2). Although paragraph (a)(8) of section 1677b allows that constructed value "may be adjusted, as appropriate, pursuant to this subsection," subparagraph (a)(6)(B)(ii)—which describes reductions to the starting foreign market price (including, as part of the purchase price, "additional costs, charges and expenses incident to bringing the foreign like product from the original place of shipment in the exporting country to the place of delivery to the purchaser")—is not applicable to determining constructed value, which involves a build-up of the costs involved in production and sale, plus profit, to the same or similar point in distribution that may be compared to export price as the foregoing de-

termination of normal value.[2] Moreover, the possible consideration of the movement costs of the canceled sales even as a matter of constructed value is made further problematic by the absence of any determination that they were properly considered "foreign like product."

Elsewhere in section 1677b, the circumstance-of-sale adjustment of subparagraph (a)(6)(C)(iii) is inapplicable because it is limited to expenses that "bear a direct relationship to[ ] the particular sale in question." 19 C.F.R. § 351.410(b).[3] The LOT adjustment of subparagraph (a)(7)(A) offered the tantalizing possibility of explaining the inclusion of these indirect selling expenses in the margin calculation, given the fact that this review involves export price sales; however, Commerce preliminarily determined that all sales comparisons for Agro Dutch were at the same LOT, such that "an adjustment pursuant to section 773(a)(7)(A) [19 U.S.C. § 1677b(a)(7)(A)] is not warranted."[4] In any event, these are expenses "associated with U.S. sales." Similarly, although the constructed export price offset provision, 19 U.S.C. § 1677b(a)(7)(B), references "indirect selling expenses" (and concerning which appears the only definition thereof in the U.S. Code), the provision is inapplicable, since this matter does not involve constructed export price. *Cf.* 19 C.F.R. § 351.412(f)(2). Lastly, the Court considered the possibility that U.S. indirect selling expenses might somehow be implicated in the allocation of profit in the constructed value determination. However, in the final results Commerce ultimately decided that all of Agro Dutch's sales to Israel were below the cost of production and it therefore relied upon the weighted average selling expenses and profit ratios derived for other respondents in deriving constructed value for Agro Dutch. *See infra.* Agro Dutch's U.S. indirect selling expenses would simply be irrelevant in that context. In short, based on the foregoing, constructed value does not appear to have provided the vehicle for considering the U.S. indirect selling expenses at issue to be part of the calculus.

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[2] In passing, it is perhaps worth noting that Commerce calculates the cost of manufacturing component of constructed value as the cost of manufacturing the U.S. subject merchandise. *See Import Administration Policy Bulletin* 91.2 (Dep't Comm. Jul. 18, 1991). Therefore an adjustment to constructed value "for differences in merchandise" is unnecessary when considering constructed value, according to *Antidumping Manual*, ch. 8, sec. XIII, para. B.2 (Dep't Comm. Jan. 22, 1998).

[3] The offset of 19 C.F.R. § 351.410(e) (limited to the lesser of commissions paid or U.S. indirect selling expenses, to account for commissions paid in one market but not in the comparison market) also appeared inapplicable to Agro Dutch's situation, *see* 69 Fed. Reg. at 10664 (offset applied to Premier and Weikfield), and if it were applicable, it might have been to Agro Dutch's benefit, given the magnitude of the disputed "U.S." expenses. *See, e.g.*, Conf. R. 50, Attach. 2.

[4] 69 Fed. Reg. at 10662. *See also* 69 Fed. Reg. 51630 (no modification of LOT determination). Although subsection 1677b(a) does not specifically authorize a LOT adjustment to constructed value, paragraph (a)(8) states that constructed value "may be adjusted, as appropriate, pursuant to this subsection."

If the expenses at bar are in fact indirect selling expenses associated with U.S. sales, and at this point this opinion draws no conclusions one way or the other about the matter, then the statutory and regulatory provisions do not explain their impact upon the margin for Agro Dutch, and neither do the parties. Their briefs focus on attributing these movement expenses to either the U.S. or foreign market but do not address how such expenses would enter into the dumping equation at the outset or whether that would even be proper. For example, although Commerce stated that the treatment of these movement expenses is consistent with *Certain Color Television Receivers From Malaysia, supra*, 69 Fed. Reg. 20592 (*see* issues and decision memorandum, comment 2), that determination involved both export price and constructed export price, whereas only the latter were adjusted for indirect selling expenses "associated with economic activities occurring in the United States." *See Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions From Malaysia*, 68 Fed. Reg. 66810, 66812–13 (Nov. 28, 2003). Also, the parties focused on disputing the implications of the returned merchandise that were addressed in *Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 42496 (Aug. 7, 1997), the government implying that the determination stands for the proposition that associating return freight expenses to future sales is administratively burdensome, because of the difficulty of following the expense history of various merchandise lots resold in subsequent lots, as well as distortive to U.S. price, to the extent that 19 U.S.C. § 1677a(c)(2)(A) would require freight charges for the future sales to begin at the point of shipment associated with such later sales (Def.'s Br. at 11 (referencing *id.* at 42502)), and Agro Dutch distinguishing, correctly, *Cookware From Mexico* as having involved a sale that was not canceled and arguing that any "administrative difficulty" of understanding the expense history of the recalled sales of this matter is not present in this review since Commerce was able to identify without problem that the recalled merchandise itself was in fact resold in third countries (Pl.'s Reply at 3–4). But be that as it may, the administrative record also indicates certain "awareness" that treating the expenses at issue as indirect selling expenses, however associated, would seem to obviate their inclusion in a comparison involving export price and constructed value. *Cf. I&D Memo*, Pub. R. 141, at 4 ("[CFMT] notes that, in EP comparisons, as is the case here, indirect selling expenses are not subtracted from the U.S. price, nor added to NV, nor included in the COP").

There being insufficient explanation on the record to address or explain the impact of these movement expenses of the canceled sales as U.S. indirect selling expenses on the calculation of Agro Dutch's

margin, not to mention doubt as to the legality of such application, it is appropriate to remand the matter to Commerce for reconsideration of the issue of these movement expenses, both to and from the United States, in its entirety. In doing so, Commerce shall also consider whether it is appropriate to treat the expenses as extraordinary costs or otherwise distortive to include them in the margin calculation. *Cf. Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India*, 63 Fed. Reg. 72246, 72251 (Dec. 31, 1998) ("The Department's long-standing practice with regard to 'unforeseen events' is to treat expense items as extraordinary . . . when they are both unusual in nature and infrequent in occurrence").

II. *Surrogate Home Market Selling Expenses (Commissions)*

The antidumping statute provides that the calculation of constructed value requires the inclusion of the actual amounts realized by the exporter under review for selling, general and administrative expenses in its home market, and if no actual expense data are available then it requires the inclusion of the selling expenses incurred "in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" are used, but if no such data are available then *inter alia* a weighted average of the actual selling expenses experienced by other producers or exporters in the home market under review in the same proceeding will substitute. *See* 19 U.S.C. § 1677b(e).

Agro Dutch did not incur any selling expenses in the home market. In the preliminary review, in order to achieve an appropriate comparison of export price to constructed value Commerce made a circumstance-of-sale adjustment to Agro Dutch's constructed value by deducting the weighted average direct selling expenses of Agro Dutch's above-cost sales in the third country market and adding U.S. direct selling expenses. 69 Fed. Reg. at 10665. *See* 19 U.S.C. § 1677b(a)(8); 19 C.F.R. § 351.410 (providing for circumstance of sale adjustments, pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii), "only for direct selling expenses and other assumed expenses" under subsection (b) as well as "other selling expenses" under subsection (e) to compensate for commissions paid only in one market). For the final results, Commerce determined that all of Agro Dutch's sales to Israel had been below the cost of production and it therefore relied entirely on constructed value in place of normal value. Agreeing with CFMT's argument, Commerce used the weighted average selling expenses and profit ratio derived from two other respondents, Premier and Weikfield, as the profit allocation to the constructed value for Agro Dutch. 69 Fed. Reg. at 51631. The issue here concerns Commerce's decision to treat the home market commissions paid by Weikfield to

its selling-agent affiliate, WPCL, as indirect expenses rather than as direct expenses.

Commerce's practice is to treat affiliated party payments for services directly related to the sale of merchandise as commissions if the respondent can demonstrate that the payments were at arm's length. *See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 67 Fed. Reg. 55780 (Aug. 30, 2002) (issues and decision memorandum, comment 7); *Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from Belgium*, 56 Fed. Reg. 56359, 56362 (Nov. 4, 1991). To establish that affiliate payments are at arm's length, Commerce compares them to those paid to unaffiliated selling agents in the same market, but only if the comparison would be useful. For example, in the preceding administrative review, which was the third such review, Commerce denied Weikfield's claim that the home market commissions paid to WPCL had been at arm's length because of the difficulty of trying to equate WPCL's services to and payments by Weikfield with those provided by and to unaffiliated selling agents. *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 41303 (Jul. 11, 2003) (issues and decision memorandum, comment 4); *see also Certain Preserved Mushrooms From India: Preliminary Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 11045 (Mar. 7, 2003). *Cf. Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 13896, 13901 (Mar. 8, 2001) (first administrative review).

In the instant review, Weikfield again asserted that the commissions paid to WPCL during the POR had been at arm's length and that its marketing and promotion activities in India would cost at least as much as if contracted by an unaffiliated company. *See* Pub. R. 98 at 28 (Dec. 23, 2003) (verification report). Commerce verified that Weikfield had in fact paid commissions to WPCL in connection with its sales activities on behalf of Weikfield and that WPCL was instrumental in establishing a market for Weikfield's products in India, *id.* at 17, but in the end Commerce agreed with CFMT that Weikfield had not established the arm's length nature of the home market commissions paid to WPCL, and it therefore declined to consider the home-market commissions paid to WPCL as a direct deduction, instead considering the payments as indirect selling expenses. *See I&D Memo*, Pub. R. 141, at 9. The final results, incorporating by reference the unaltered preliminary determination on the issue, implied that the decision was consistent with the final results reached in the preceding administrative review. *See* 69 Fed. Reg. 51631 (referencing *I&D Memo*, Pub. R. 141); *see also* 69 Fed. Reg. at 10664. Agro Dutch argues here that this determination was arbitrary and

resulted in overstated selling expenses attributed to Weikfield and assigned to Agro Dutch.

The government defends the decision to treat the commissions as indirect selling expenses as consistent with Commerce's practice, which is not to treat home market commissions paid by a respondent to an affiliate as direct deductions unless the respondent can demonstrate that the commissions were made at arm's length. Def.'s Br. at 14. The government contends that Weikfield simply failed to demonstrate that the commissions paid to WPCL had been at arm's length. Since Weikfield did not question the decision to treat the commissions to WPCL as indirect selling expenses in its brief commenting on the preliminary results, Commerce therefore did not address the issue in greater detail in the final results, according to the government.

CFMT supports the government's position but contends as an initial matter that Agro Dutch did not raise the issue before Commerce either and therefore failed to exhaust its administrative remedies pursuant to 28 U.S.C. § 2637(d). CFMT argues that Agro Dutch, as the party in possession of its own sales and cost data, knew or should have known of the consequences of the revised data it presented to Commerce on June 2, 2004, particularly in light of CFMT's argument in its case brief that Commerce should use Weikfield's selling expenses as part of any normal value calculation. Def-Int's Br. at 10.

Pursuant to 19 C.F.R. § 351.309(c)(2), a party to the proceeding is required to present "all arguments" in its case brief that "continue in the submitter's view to be relevant" to the final results of the review. The question is whether the issue of the arm's length nature of Weikfield's commission payments to WPCL became relevant to Agro Dutch prior to conclusion of administrative case briefing. CFMT contends that it did, and that Agro Dutch knew or should have known that Commerce would rely on constructed value in the final results. CFMT contends that at verification Agro Dutch presented certain clarifications and corrections, and that

> [a]nalysis of these revised data revealed the need to rely on constructed value, a consequence of which Agro Dutch was surely aware. The consequences of Agro Dutch's data revisions were recognized by [CFMT] upon release of the verification report and exhibits and receipt of the revised third-country sales database. They would have been no less recognizable to respondent Agro Dutch, which owned, presented and verified those same data. Yet Agro Dutch failed to take any affirmative position regarding *any* aspect of how Weikfield's or Premier's selling expenses would be imputed to its own constructed value. It then also failed to address [CFMT]'s case brief arguments on the need to use Weikfield's data for constructing normal value.

> Agro Dutch's failure to raise any issue related to the treatment of Weikfield's affiliated-party commissions is particularly noteworthy because Agro Dutch had actual knowledge that Commerce would not consider Weikfield's affiliated-party commissions to be [at arm's length] . . . since the *Preliminary Results* of the review. . . .

Def-Int's Br. at 11–12 (italics in original).

Agro Dutch replies that it did not challenge the issue of the calculation of Weikfield's selling expenses after the preliminary results because it was irrelevant to its own preliminary results and therefore it had no cause or standing to brief the issue at this juncture. Pl.'s Reply at 5. Agro Dutch contends that it was not until issuance of the final results that it could complain of the implications of an administrative decision not to rely on Agro Dutch's third-country sales information and rely instead entirely on constructed value. *Id.* at 6.

As a general matter, "[t]he doctrine of exhaustion of administrative remedies provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' " *McKart v. United States*, 395 U.S. 185, 193 (1969) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)). If a party does not exhaust available administrative remedies, "judicial review of administrative action is inappropriate[.]" *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988). When considering non-classification matters, however, there are several identified exceptions to the exhaustion requirement, including (1) the futility of raising the issue, (2) a judicial decision rendered subsequent to the administrative determination materially impacting the issue, (3) a pure question of law, (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. *See generally Consolidated Bearings Co. v. United States*, 25 CIT 546, 552–53, 166 F.Supp.2d 580, 586 (2001), *rev'd on other grounds*, 348 F.3d 997 (Fed. Cir. 2003). The situation here, however, is not one of these. Agro Dutch was aware that CFMT had raised the possibility that analysis of the cost of production for the sales to Israel would result in no above-cost sales, and that in that event Commerce should use the weighted average of Weikfield's and Premier's home market selling expenses and profits as part of Agro Dutch's constructed value calculation. *See* Pub R. 130 at 15 (CFMT's case brief). Further, Agro Dutch was also aware of CFMT's argument that Weikfield's commission payments to WPCL had not been at arm's length and of the record as developed with respect to that issue, including the preliminary determination to treat those commissions as indirect selling expenses rather than direct expenses. Agro Dutch did not comment on the issue by way of rebuttal before Commerce, where it might have better-preserved its interests in the arguments before Commerce that it presses here. *Cf.* Pub. R.

135 (June 24, 2004) (Agro Dutch rebuttal brief). After considering the parties' respective positions on the matter, the Court is constrained to agree that Agro Dutch has indeed failed to exhaust its administrative remedy with respect to this issue. *Accord, N.A.R., S.p.A. v. United States*, 14 CIT 409, 419, 741 F. Supp. 936, 944–45 (1990) (party who "was aware, or should have been aware" of action taken in preliminary determination should have raised its objection to action before final determination).

Even if there had not been a failure to exhaust administrative remedies, the final results would have to be sustained with respect to this issue. The record shows that Weikfield asserted that "contracting with an unaffiliated company to perform the same marketing and promotion activities that WPCL has performed for WAPL [i.e., Weikfield] would probably cost at least as much as the . . . commission that WAPL pays WPCL," Pub. R. 98, *supra*, at 28, and also that Weikfield acknowledged "[c]ircumstances have not changed since the last administrative review[,]" in which Commerce found that the WPCL commissions had not been made at arm's length. Pub. R. Doc. 68 at S–10 (Aug. 19, 2003). This statement, that commissions to unaffiliated commissionaires would "probably" cost as much as those paid to WPCL, appears to be mere speculation and therefore falls short of the specific evidence required for a respondent to demonstrate that its commissions were made at arm's length. *See NTN Corp. v. United States*, 28 CIT ___, ___, 306 F. Supp. 2d 1319, 1341 (2004); *Torrington Co. v. United States*, 25 CIT 395, 436, 146 F. Supp. 2d 845, 890 (2001). Further, although Weikfield stated the WPCL plays a "distinctly different" role than the unaffiliated commissionaire in home market sales, it provided no evidence as to what the commission payments would have been for an unaffiliated commissionaire who plays a similar role as WPCL. *See* Pub. R. 98 at 28.

This was essentially the same problem that Commerce confronted in the prior review. *See* 68 Fed. Reg. 41303, *supra* (issues and decision memorandum, comment 4). Commerce determined that the evidence was insufficient to support finding Weikfield's commissions to WPCL to have been made at arm's length, and the Court finds that substantial evidence supports this conclusion. Without a proper benchmark of payment for services against which to evaluate Weikfield's payments to WPCL, it is difficult to discern how Commerce could have found otherwise. *Cf. Outukumpu Copper Rolled Products AB v. United States*, 18 CIT 204, 210–11, 850 F. Supp. 16, 22–23 (1994) (affirming finding that commissions were not made at arm's length because "Commerce was unable to establish a benchmark against which to compare the arm's length nature of the 'commission' payments")). Therefore, the Court sustains the final results as to this issue.

III. *Duty Absorption*

Lastly, Agro Dutch complains that Commerce's decision that it absorbed antidumping duties was erroneous. *See* 19 U.S.C. § 1675(a)(4). The duty absorption provision was added by section 220(a) of the URAA, *see* 108 Stat. at 4859, and provides that Commerce shall, if requested, determine during an administrative review that is initiated two or four years after the publication of the antidumping duty order whether antidumping duties have been absorbed by a foreign producer or exporter if the subject merchandise is sold in the United States through an importer affiliated with such foreign producer or exporter, and it shall share that finding with the U.S. International Trade Commission. *Id.* The provision does not affect the calculation of the margin in the review, as it was not intended to provide for the treatment of antidumping duties as a cost; rather, a finding of duty absorption is only to be considered a "strong indicator" by Commerce of whether current dumping margins are not indicative of the margins that would exist if the order were revoked. *See* H.R. Rep. No. 103–826(I), at 60 (Oct. 3, 1994); S. Rep. No. 103–412, at 44, 50 (Nov. 22, 1994); SAA at 886, 1994 U.S.C.C.A.N. at 4210. In practice, from Commerce's perspective the duty absorption inquiry appears to involve little more than determining whether the importer is affiliated with the foreign producer/exporter and whether there is more than a *de minimis* dumping margin: if both conditions are true, the burden shifts to the respondent to prove non-absorption, *e.g.*, by producing an enforceable contract for the ultimate purchaser to pay the full duty assessed on the merchandise. *See*, e.g., *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 751, 155 F. Supp. 2d 801, 812–813 (2001).

The parties do not dispute that the first two prerequisites to a duty absorption inquiry were present in this instance: CFMT requested that Commerce conduct the inquiry, *see* Pub. R. 6 (Feb. 28, 2003) (letter to Commerce from counsel for CFMT), and the administrative review was initiated four years after publication of the antidumping duty order. For the preliminary review, Commerce determined that since Agro Dutch had acted as importer of record for nearly 80% of its U.S. sales, it was therefore "affiliated" (with itself) within the meaning of the statute, and therefore a duty absorption inquiry was required. *See* 69 Fed. Reg. at 10661. After receiving CFMT's request, Commerce requested evidence from Agro Dutch to demonstrate that the unaffiliated purchaser(s) will ultimately be responsible for payment of antidumping duties assessed on entries during the POR as a result of the administrative review proceeding. Pub. R. 80 (Sep. 30, 2003) (letter from Commerce to counsel for Agro Dutch). Agro Dutch proffered no such evidence in response, and Commerce therefore preliminarily determined that the evidence was inconclusive to establish unconditional commitment by the first unaffiliated purchaser of the subject merchandise to pay the full duty

to be assessed on the subject merchandise and that Agro Dutch had therefore absorbed antidumping duties. *See* 69 Fed. Reg. at 10661. For support, Commerce relied on *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 12725 (Mar. 16, 1998) (finding that exporters who are also the importers of record are "'affiliated' within the meaning of" 19 U.S.C. § 1675(a)(4)). *See* Pub. R. 77 (Sep. 23, 2003) (memorandum of to file). For the final results, Commerce reiterated its determination that Agro Dutch had absorbed antidumping duties. *See I&D Memo*, Pub. R. 141, at 7–8 (finding lack of evidence that "the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise").

Agro Dutch argues the standard applied by Commerce in this instance, that Agro Dutch was "affiliated" as an exporter and importer for the purpose of determining whether to conduct a duty absorption inquiry, is not in accordance with the plain language of the statute. Agro Dutch points out that all of its sales were considered export price sales and not constructed export sales, and that there was no evidence or finding by Commerce that Agro Dutch had sold subject merchandise during the POR through a related importer. Pl.'s Br. at 11 (referencing 69 Fed. Reg. 10659, Pub. R. 113). Agro Dutch further argues that even if the standard employed is in accordance with law, the record compiled in the matter does not support a finding of duty absorption because Commerce verified that the antidumping duties paid upon importation were passed along to Agro Dutch's unaffiliated purchaser and that the verified sample invoices show that the price of the merchandise charged by Agro Dutch to its customer included the payment of duties. *Id.* (referencing Conf. R., Verif. Ex. 17, Inv. ADIL/0756). Agro Dutch describes invoice 0756 as showing a price originally charged to the customer that includes the antidumping duties paid, from which are subsequently subtracted in a separate line item these same duties, since they had actually been paid by the customer directly to U.S. customs—all of which Commerce verified and which was in agreement with what Agro Dutch reported to Commerce in its sales listing.

The government's initial response is that Agro Dutch also failed to exhaust its administrative remedies with respect to this issue, specifically with respect to the argument that a basic prerequisite for finding duty absorption—separate importer and producer/exporter entities—is absent in this matter. The government construes Agro Dutch's administrative case brief as "conceding" that a duty absorption inquiry was "proper" in this instance because it only objected to the factual finding that Agro Dutch had absorbed duties and did not challenge the prerequisites to such finding. Def.'s Br. at 25 (referencing Pub. R. 130, at 2–3 (June 10, 2004) (Agro Dutch administrative case brief)). The government argues that this matter is similar to *Ta*

Chen Stainless Steel Pipe, Ltd. v. United States, 28 CIT ___ , 342 F. Supp. 2d 1191 (2004) and *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147 (2001) because, as in those cases, the issue was not raised in the claimant's case brief.

Once again, if a party does not exhaust available administrative remedies, "judicial review of administrative action is inappropriate[.]" *Sharp Corp.*, *supra*, 837 F.2d at 1062. One of the exceptions to the exhaustion doctrine, however, is a "pure" question of law, *i.e.*, a novel argument of a purely legal nature requiring neither further agency involvement nor further factual development or an "opening up" of the administrative record or undue delay nor expenditure of scarce time and resources. *See Consolidated Bearings, supra* 25 CIT at 553, 166 F. Supp. 2d at 586–87. To the extent Agro Dutch's argument implicates a pure question of law, it may be addressed here. *Cf. id.*, 348 F.3d at 1003 ("[s]tatutory construction alone is not sufficient to resolve this case" because one of cross-appellant's arguments concerned divergence from administrative practice).

The government next argues that if the issue is appropriate for consideration, then Commerce's interpretation of subsection 1675(a)(4) is reasonable because Congress failed to provide clear guidance on the issue of conducting an duty absorption inquiry when the producer or exporter is itself the importer of record, thus making the statute silent or ambiguous with respect to that issue and Commerce's interpretation thereof deserving of *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Applying "traditional tools of statutory construction,"[5] the government argues that it is evident from the plain text of the statute that the relevant inquiry is whether the "foreign producer or exporter" absorbed antidumping duties and that the "statute was written to encompass the ambiguous scenario of absorption when there is an affiliated importer; thus, by implication it similarly encompasses the more obvious scenario of absorption when the producer or exporter acts as importer." Def.'s Br. at 29 (referencing general principle of statutory construction that a statute "embraces such consequential applications and effects as are necessary, essential, natural or proper") (quoting 2B Norman J. Singer, ed., *Sutherland on Statutes and Statutory Construction* § 55.036, at 285 (6th ed. 2000)). The government thus argues "[i]t is necessary, essential, natural or proper that [sub]section 1675(a)(4) encompass sales through the producer or exporter itself as the importer of record." Def.'s Br. at 29. *Cf.* 19 U.S.C. § 1675(a)(4). The government contends that examination of the legislative history supports Commerce's conclusion that the purpose of subsection 1675(a)(4) is to provide a disincentive for the exporter or producer to absorb antidumping duties

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[5] *Timex V.I. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (quoting *Chevron*, 467 U.S. at 843 n.9).

and to pass the cost of the duties on to its customers, which would "eliminate" the dumping. Def.'s Br. at 29 (referencing SAA).[6] Lastly, the government argues that substantial evidence supports Commerce's determination because Agro Dutch did not provide the necessary evidence to establish that the unaffiliated purchaser will pay the full duty ultimately assessed on the merchandise, and also that the final results are consistent with other administrative determinations that have construed subsection 1675(a)(4) as encompassing the situation where the importer and producer/exporter are one and the same. Def.'s Br. at 27 (referencing *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Preliminary Results of Antidumping Duty Administrative* Review; 69 Fed. Reg. 70226 (Dec. 3, 2004); *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 Fed. Reg. 54635, 54637 (Sep. 9, 2004); *Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France*, 69 Fed. Reg. 47892 (Aug. 6, 2004); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Duty Administrative Reviews*, 63 Fed. Reg. 12725 (Mar. 16, 1998)).

The issue here turns on whether the duty absorption provision is clear or ambiguous. Where the meaning of the statute is clear, that is the end of the matter and a court should not examine the legislative history to resolve the question. *Int'l Bus. Mach. Corp. v. United States*, 201 F.3d 1367, 1372 (Fed. Cir. 2000). If the meaning is plain, it is applicable unless "it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring) (citation omitted). In this instance, although the parties appar-

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6 When an importer is affiliated with the exporter, dumping is measured by reference to the affiliated importer's resale price. However, it is the affiliated importer, not the unaffiliated U.S. purchaser of the dumped goods, who must pay the antidumping duty. Under certain circumstances, the affiliated importer may choose to pay the antidumping duty rather than eliminate the dumping, either through lowering prices in the foreign market, raising prices in the United States, or a combination of both.

SAA at 886, 1994 U.S.C.C.A.N. at 4210. As a legal and practical matter, the responsibility for payment of antidumping duty always falls on the importer of record, regardless of affiliation. *See* 19 U.S.C. §§ 1481, 1484, 1624; 19 C.F.R. § 141.1. If elimination of dumping is the objective, "lowering prices in the foreign market" is beyond the ability of the importer, and thus it may be inferred that this "suggestion" was made with the foreign producer or exporter in mind. At any rate, whether the provision was enacted with deterrence in mind, from the perspective of either the importer or the foreign producer or exporter it is difficult to discern how the uncertainty of retrospective antidumping duty assessment in the future could possibly be quantified at the present time of an importation.

ently take the position that the conditional clause of the statute is "plain text" (*i.e.*, the operation of the statute is predicated on finding that "the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter"), the Court can not conclude that the meaning of "affiliated" is unambiguous.

On the one hand, the term is not defined either as a noun or a verb in the antidumping statute but appears only in the context of "affiliated persons," who include in relevant part "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person" as well as "[a]ny person who controls any other person and such other person" among other familial and corporate relationships, and "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33)(F)&(G).[7] Common to such definitions is the fact that an affiliated relationship involves two or more persons. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (" '[a]ffiliated persons' includes any group in which one person controls another"). The statute does not reference, let alone define, a singular "affiliated person." Hence, on the one hand, it is a stretch to interpret a single entity as being affiliated with itself, possibly precluded by operation of merger.

On the other hand, the antidumping statute more accurately describes functions, not entities. A single entity may, in fact, wear "multiple hats" in the process of manufacturing, selling and distributing merchandise. Commerce's interpretation appears less contorted when considered in such context. *Cf.*, *e.g.*, *United Dominion Industries, Inc. v. United States*, 532 U.S. 822 , 829–838 (2001) (affiliated group's product liability loss must be figured on a consolidated, single-entity basis and not by aggregating product liability losses, separately determined company by company); *N.L.R.B. v. Thalbo Corp.*, 171 F.3d 102, 114 (2nd Cir. 1999) (hotel operator and its affiliate were single entity for purposes of the National Labor Relations Act); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) (common ownership and control do not liberate corporations from the impact of the antitrust laws).

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[7] The defining antidumping regulation states that "[a]ffiliated persons" and "affiliated parties" have the same meaning as in section 771(33) of the Act[,]" and in describing affiliated relationships goes on to state that "[t]he Secretary will not find that control exists . . . unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." 19 C.F.R. § 351.102(b).

The fact that this determination involves export price and not constructed export price might appear at odds with Commerce's interpretation of subsection 1675(a)(4), *cf.* 19 U.S.C. § 1677a(a) *with* § 1677a(b), however Commerce's interpretation of subsection 1675(a)(4) appears to be a reasonable, common-sense solution to what Congress attempted to accomplish with its enactment. This conclusion is inherent from the statute's focus—upon duty absorption in the foreign producer or exporter—and therefore even if the meaning of "affiliate" were clear, and resort to legislative history unnecessary, to find that the statute does not address the circumstance of the foreign producer or exporter itself acting as the importer of record would result in an apparent absurdity.[8]

Conclusion

For the foregoing reasons, this matter will be remanded to Commerce for reconsideration of Agro Dutch's movement expenses associated with the recalled merchandise.

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[8] Discussion of the appropriate level of deference to be accorded to Commerce's interpretation is therefore obviated.

Index

Customs Bulletin and Decisions
Vol. 40, No. 16, April 12, 2006

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

U.S. Court of International Trade

Slip Opinions

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